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ABSTRACT

In its report on the bill (S. 1361) for the general revision of the copyright law, the Senate Committee on the Judiciary presents its amendments to the bill followed by its analysis and recommendations. As amended, the bill provides for the general revision of the copyright law, the establishment in the Library of Congress of a National Commission on New Technological Uses of Copyrighted Works, and a new type of protection for ornamental designs of useful articles. Included in the analyses are the additional views of Senator John V. Tunney on the cable television provisions of the bill, and those of Senator Hugh Scott on the cable television and recording arts performance royalty sections. A minority report suggests changes in the recording arts performance royalty provisions. (For the text of S. 1361 see IR 001 290.) (Author/SL)

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COPYRIGHT LAW REVISION

JULY 3, 1974.—Ordered to be printed
Filed under authority of the order of the Senate of June 27, 1974

Mr. MCCLELLAN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1361]

The Committee on the Judiciary, to which was referred the bill (S. 1361) for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

AMENDMENT

Strike all after the enacting clause and insert in lieu thereof the following:

TITLE I—GENERAL REVISION OF COPYRIGHT LAW

SEC. 101. Title 17 of the United States Code, entitled "Copyrights," is hereby amended in its entirety to read as follows:

TITLE 17—COPYRIGHTS

CHAPTER	Sec.
1. SUBJECT MATTER AND SCOPE OF COPYRIGHT	*101*
2. COPYRIGHT OWNERSHIP AND TRANSFER	*201*
3. DURATION OF COPYRIGHT	*301*
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102. *Subject matter of copyright: In general.*
103. *Subject matter of copyright: Compilations and derivative works.*
104. *Subject matter of copyright: National origin.*
105. *Subject matter of copyright: United States Government works.*
106. *Exclusive rights in copyrighted works.*
107. *Limitations on exclusive rights: Fair use.*
108. *Limitations on exclusive rights: Reproduction by libraries and archives.*

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Chapter 1.—SUBJECT MATTER AND SCOPE OF COPYRIGHT—Continued

Sec.
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111. *Limitations on exclusive rights: Secondary transmissions.*
112. *Limitations on exclusive rights: Ephemeral recordings.*
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114. *Scope of exclusive rights in sound recordings.*
115. *Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.*
116. *Scope of exclusive rights in nondramatic musical works and sound recordings: Public performances by means of coinoperated phonorecord players.*
117. *Scope of exclusive rights: Use in conjunction with computers and similar information systems.*

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless

of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are his immediate offspring, whether legitimate or not, and any children legally adopted by him.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dram-

atization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "device," "machine," or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impact an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible, and, in the case of a sound recording, to make audible the sounds fixed in it.

"Phonorecords" are material objects in which sounds other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, plans, diagrams, and models.

A "pseudonymous work" is a work on the copies or phonorecords, of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or photorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to

the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

The "United States," when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article."

The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of his official duties.

A "work made for hire" is:

(1) a work prepared by an employee within the scope of his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, as a photographic or other portrait of one or more persons, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

A "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes. An "instructional text" is a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) *dramatic works, including any accompanying music;*

(4) *pantomimes and choreographic works;*

(5) *pictorial, graphic, and sculptural works;*

(6) *motion pictures and other audiovisual works;*

(7) *sound recordings.*

(b) *In no case does copyright protection for an original work of authorship extend to any idea, plan, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.*

§ 103. Subject matter of copyright: Compilations and derivative works

(a) *The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.*

(b) *The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.*

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—*The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.*

(b) PUBLISHED WORKS.—*The works specified by sections 102 and 103, when published, are subject to protection under this title if—*

(1) *on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national,*

domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention of 1952; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(4) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, he may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

(c) The expropriation, by a governmental organization of a foreign country, of a copyright, or the right to secure a copyright, or any right comprised in a copyright, or any right in a work for which copyright may be secured, or the transfer of a copyright or of any such right, or the power to authorize any use of the work thereunder, from the author or copyright owner to a governmental agency of a foreign country pursuant to any law, decree, regulation, order or other action of the government effecting or requiring such transfer, shall not be given effect for the purposes of this title.

§ 105. Subject matter of copyright: United States Government works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 117, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord, under the conditions specified by this section, if:

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field,

(3) The reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section

apply to a copy, made from the collection of a library or archives where the user makes his request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if:

(1) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(2) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if:

(1) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(2) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or

who requests a copy under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds fair use as provided by section 107;

(3) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee:

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c).

§ *109.* Limitations on exclusive rights: *Effect* of transfer of particular copy or phonerecord

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or of a sound recording, or display of a work, by or in the course of a transmission, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or of a sound recording, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work or of a sound recording, otherwise than in a transmission to the public without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions:

(i) The notice shall be in writing and signed by the copyright owner or his duly authorized agent; and

(ii) The notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for his objections; and

(iii) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) performance of a nondramatic musical work or of a sound recording in the course of an annual agricultural or horticultural fair or exhibition conducted by a governmental body or a nonprofit agricultural or horticultural organization;

(7) performance of a nondramatic musical work or of a sound recording by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work and the performance is not transmitted beyond the place where the establishment is located.

§ 111. Limitations on exclusive rights: Secondary transmissions

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by a common, contract, or special carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: Provided, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmission; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) Subject to the provisions of clause (2) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a

work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) in the following cases:

(A) Where the signals comprising the primary transmission are exclusively aural and the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission; or

(B) Where the community of the cable system is in whole or in part within the local service area of the primary transmitter; or

(C) Where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations or authorizations of the Federal Communications Commission; or

(B) Where the cable system, at least one month before the date of the secondary transmission, has not recorded the notice specified by subsection (d).

(d) *COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—*

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of the secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it together with the name

nd location of the primary transmitter, or primary transmitters, and thereafter, from time to time, such further information as the Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, during the months of January, April, July, and October, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation—

(A) A statement of account, covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers to the cable system, and the gross amounts paid to the cable system irrespective of source and separate statements of the gross revenues paid to the cable system for advertising, leased channels, and cable-casting for which a per-program or per-channel charge is made and by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters; and

(B) A total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) ½ percent of any gross receipts up to $40,000;

(ii) 1 percent of any gross receipts totalling more than $40,000 but not more than $80,000;

(iii) 1½ percent of any gross receipts totalling more than $80,000, but not more than $120,000;

(iv) 2 percent of any gross receipts totalling more than $120,000, but not more than $160,000; and

(v) 2½ percent of any gross receipts totalling more than $160,000.

(3) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions made during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws (as designated in section 1 of the Act of October 15, 1914, 38 Stat. 730, Title 15 U.S.C. section 12, and any amendments of such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the statement of account or the distribution of royalty fees. If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If he finds the existence of a controversy he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(C) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) *DEFINITIONS.—*

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States.

A "cable system" is a facility, located in any State, Territory, Trust Territory or Possession that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2)(B), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter" comprises the area in which a television broadcast station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules and regulations of the Federal Communications Commission.

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or

transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(1) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(2) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(3) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord for each transmitting organization specified in clause (2) of this subsection of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the pre-existing works employed in the program.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(1) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 of the common law or statutes of a State, in effect on December 31, 1974, as held applicable and construed by a court in an action brought under this title.

(2) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles

in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

(b) When a pictorial, graphic, or sculptural work in which copyright subsists under this title is utilized in an original ornamental design of a useful article, by the copyright proprietor or under an express license from him, the design shall be eligible for protection under the provisions of title III of this Act.

(c) Protection under this title of a work in which copyright subsists shall terminate with respect to its utilization in useful articles whenever the copyright proprietor has obtained registration of an ornamental design of a useful article embodying said work under the provisions of title III of this Act. Unless and until the copyright proprietor has obtained such registration, the copyright pictorial, graphic, or sculptural work shall continue in all respects to be covered by and subject to the protection afforded by the copyright subsisting under this title. Nothing in this section shall be deemed to create any additional rights or protection under this title.

(d) Nothing in this section shall affect any right or remedy held by any person under this title in a work in which copyright was subsisting on the effective date of title III of this Act, or with respect to any utilization of a copyrighted work other than in the design of a useful article.

§ 114. Scope of exclusive rights in sound recordings

(a) LIMITATIONS ON EXCLUSIVE RIGHTS.—The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (3), and (4) of section 106. The exclusive rights of the owner of copyright in a sound recording to reproduce and perform it are limited to the rights to duplicate the sound recording in the form of phonorecords or copies of audiovisual works that directly or indirectly recapture the actual sounds fixed in the recording, and to perform those actual sounds. These rights do not extend to the making or duplication of another sound recording that is an

independent fixation of other sounds, or to the performance of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

(b) Performance Rights Distinct.—The exclusive right to perform publicly, by means of a phonorecord, a copyrighted literary, musical, or dramatic work, and the exclusive right to perform publicly a copyrighted sound recording, are separate and independent rights under this title.

(c) Compulsory License for Public Performance of Sound Recordings.—

(1) Subject to the provisions of sections 111 and 116, the public performance of a sound recording is subject to compulsory licensing under the conditions specified by this subsection, if phonorecords of it have been distributed to the public under the authority of the copyright owner.

(2) Any person who wishes to obtain a compulsory license under this subsection shall fulfill the following requirements:

(A) He shall at least one month before the public performance and thereafter at intervals and in accordance with requirements that the Register of Copyrights shall prescribe by regulation, record in the Copyright Office a notice stating his identity and address and declaring his intention to obtain a compulsory license under this subsection;

(B) Deposit with the Register of Copyrights, at annual intervals in accordance with requirements that the Register of Copyrights shall prescribe by regulation, a statement of account and a total royalty fee for the period covered by the statement, based on the royalty rates specified by clause (4).

(3) In the absence of a negotiated license, failure to record the notice, file the statement, or deposit the royalty fee prescribed by clause (2) renders the public performance of a sound recording actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through

505, but not including the criminal remedies provided by section 506.

(4) The annual royalty fees under this subsection may, at the user's option, be computed on either a blanket or a prorated basis. Although a negotiated license may be substituted for the compulsory license prescribed by this subsection, in no case shall the negotiated rate amount to less than the applicable rate provided by this clause. The following rates shall be applicable:

(A) For a radio or television broadcast station licensed by the Federal Communications Commission, the royalty rate shall be as follows:

(i) in the case of a broadcast station with gross receipts from its advertising sponsors of more than $25,000 but less than $100,000 a year, the yearly performance royalty payment shall be $250; or

(ii) in the case of a broadcast station with gross receipts from its advertising sponsors of more than $100,000 but less than $200,000 a year, the yearly performance royalty shall be $750; or

(iii) in the case of a broadcast station with gross receipts from its advertising sponsors of more than $200,000 a year, the blanket rate shall be one percent of the net receipts from advertising sponsors during the applicable period. The alternative prorated rate is a fraction of one percent of such net receipts, based on a calculation made in accordance with a standard formula that the Register of Copyrights shall prescribe by regulation, taking into account the amount of the station's commercial time devoted to playing copyrighted sound recordings and whether the station is a radio or television broadcaster.

(B) Subject to section 111, for background music services and other transmitters of performances of sound recordings the blanket rate is 2 percent of the gross receipts from subscribers or others who pay to receive the transmission during

the applicable period. The alternative prorated rate is a fraction of 2 percent of such gross receipts, based on a calculation made in accordance with a standard formula that the Register of Copyrights shall prescribe by regulation, taking into account the proportion of time devoted to musical performances by the transmitter during the applicable period, and the extent to which the transmitter is also the owner of copyright in the sound recordings performed during said period.

(C) For an operator of coin-operated phonorecord players, as that term is defined by section 116, and for a cable system, as that term is defined by section 111, the compulsory licensing rates shall be governed exclusively by those respective sections, and not by this subsection.

(D) For all other users not otherwise exempted, the blanket rate is $25 per year for each location at which copyrighted sound recordings are performed. The alternative prorated rate shall be based on the number of separate performances of such works during the year and, in accordance with a standard formula that the Register of Copyrights shall prescribe by regulation, shall not exceed $5 per day of use.

(d) EXEMPTIONS.—*In addition to users exempted from liability by section 110 or subject to the provisions of section 111 or 116, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance is exempted from liability for infringement and from the compulsory licensing requirements of this section, during the applicable annual period, if—*

(1) In the case of a broadcast station, its gross receipts from advertising sponsors were less than $25,000; or

(2) In the case of a background music service or other transmitter of performances of sound recordings, its gross receipts from subscribers or others who pay to receive the transmission were less than $10,000.

(e) DISTRIBUTION OF ROYALTIES.—

(1) During the month of September in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 809 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(2) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws (the Act of October 15, 1914, 38 Stat. 730, and any amendments of any such laws), for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(2) After the first day of October of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(2). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If he finds that such a controversy exists he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(3) For the purposes of this section—

(A) One half of all royalties to be distributed shall be paid to the copyright owners, and the other half shall be paid to

the performers, of the sound recordings for which claims have been made under clause (1); and

(B) During the pendency of any proceeding under this section, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(f) RELATION TO OTHER SECTIONS.—The public performance of sound recordings by means of secondary transmissions and coin-operated phonorecord players is governed by sections 111 and 116, respectively, and not by this section, except that there shall be an equal distribution of royalty fees for such public performances between copyright owners and performers as provided by subsection (e)(3)(A) of this section.

(g) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

(1) "Commercial time" is any transmission program, the time for which is paid for by a commercial sponsor, or any transmission program that is interrupted by a spot commercial announcement at intervals of less than fourteen and one-half minutes.

(2) "Performers" are musicians, singers, conductors, actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording.

(3) "Net receipts from advertising sponsors" constitute gross receipts from advertising sponsors less any commissions paid by a radio station to advertising agencies.

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) *AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—*

(1) When phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use. A person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) *NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE; DESIGNATION OF OWNER OF PERFORMANCE RIGHT.—*

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of his intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served on him, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) If the copyright owner so requests in writing not later than ten days after service or filing of the notice required by clause (1), the person exercising the compulsory license shall designate, on a label or container accompanying each phonorecord of the work distributed by him, and in the form and manner that the Register

of Copyrights shall prescribe by regulation, the name of the copyright owner or his agent to whom royalties for public performance of the work are to be paid.

(3) Failure to serve or file the notice required by clause (1), or to designate the name of the owner or agent as required by clause (2), forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords manufactured and distributed after he is so identified but he is not entitled to recover for any phonorecords previously manufactured and distributed.

(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord manufactured and distributed in accordance with the license. With respect to each work embodied in the phonorecord, the royalty shall be either three cents, or three quarter cent per minute of playing time or fraction thereof, whichever amount is larger.

(3) Royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be accompanied by a detailed statement of account, which shall be certified by a Certified Public Accountant and comply in form, content, and manner of certification with requirements that the Register of Copyrights shall prescribe by regulation.

(4) If the copyright owner does not receive the monthly payment and statement of account when due, he may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license

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will be automatically terminated. Such termination renders the making and distribution of all phonorecords, for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

§ 116. Scope of exclusive rights in nondramatic musical works and sound recordings: Public performances by means of coin-operated phonorecord players

(a) LIMITATION ON EXCLUSIVE RIGHT.—In the case of a nondramatic musical work embodied in a phonorecord, and in the case of a sound recording, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless:

(A) he is the operator of the phonorecord player; or

(B) he refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate required by subclause (1)(C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).

(b) RECORDATION OF COIN-OPERATED PHONORECORD PLAYER, AFFIXATION OF CERTIFICATE, AND ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phono-

record player shall fulfill the following requirements:

(A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available in that particular phonorecord player, he shall file in the Copyright Office, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, an application containing the name and address of the operator of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player, and in addition to the fee prescribed by clause (9) of section 708(a), he shall deposit with the Register of Copyrights a royalty fee for the current calendar year of $8 for that particular phonorecord player. If such performances are made available on a particular phonorecord player for the first time after July 1 of any year, the royalty fee to be deposited for the remainder of that year shall be $4.00.

(B) Within twenty days of receipt of an application and a royalty fee pursuant to subclause (A), the Register of Copyrights shall issue to the applicant a certificate for the phonorecord player.

(C) On or before March 1 of the year in which the certificate prescribed by subclause (B) of this clause is issued, or within ten days after the date of issue of the certificate, the operator shall affix to the particular phonorecord player, in a position where it can be readily examined by the public, the certificate, issued by the Register of Copyrights under subclause (B), of the latest application made by him under subclause (A) of this clause with respect to that phonorecord player.

(2) Failure to file the application, to affix the certificate or to pay the royalty required by clause (1) of this subsection renders

the public performance actionable as an act of infringement under section 501 and fully subject to the remedies provided by section 502 through 506.

(c) *Distribution of Royalties.*—

(1) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 809 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (a) of subsection (b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws (the Act of October 15, 1914, 38 Stat. 730, and any amendments of any such laws), for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(2) After the first day of October of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If he finds that such a controversy exists he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(3) The fees to be distributed shall be divided as follows:

(A) One eighth of the fees to be distributed shall be allocated to copyright owners and performers of sound recordings, and the remainder to owners of copyright in nondramatic musical works;

(B) The fees allocated to copyright owners and performers of sound recordings shall be divided equally between them, as provided by section 114(f);

(C) The fees allocated to owners of copyright in nondramatic musical works shall be distributed as follows:

(i) Every copyright owner not affiliated with a performing rights society shall receive the pro rata share of the fees to be distributed to which such copyright owner proves his entitlement; and

(ii) The performing rights societies shall receive the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove their entitlement.

(D) During the pendency of any proceeding under this section, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an account sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(4) The Register of Copyrights shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with

respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. Any person who alleges that he has been denied the access permitted under the regulations prescribed by the Register of Copyrights may bring on an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

(d) CRIMINAL PENALTIES.*—Any person who knowingly makes a false representation of a material fact in an application filed under clause (1)(A) of subsection (b), or who knowingly alters a certificate issued under clause (1)(B) of subsection (b) or knowingly affixes such a certificate to a phonorecord player other than the one it covers, shall be fined not more than $2,500.*

(e) DEFINITIONS.*—As used in this section, the following terms and their variant forms mean the following:*

(1) A "coin-operated phonorecord player" is a machine or device that:

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of a coin;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the

establishment in which it is located.

(2) *An "operator" is any person who, alone or jointly with others:*

(*A*) *owns a coin-operated phonorecord player; or*

(*B*) *has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or*

(*C*) *has the power to exercise primary control over the selection of the musical works made available for public performance in a coin-operated phonorecord player.*

(*3*) *A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.*

§ 117. Scope of exclusive rights: Use in conjunction with computers and similar information systems

Notwithstanding the provisions of sections 106 through 116, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1974, as held applicable and construed by a court in an action brought under this title.

Chapter 2.—COPYRIGHT OWNERSHIP AND TRANSFER

Sec.
201. Ownership of copyright.
202. Ownership of copyright as distinct from ownership of material object.
203. Termination of transfers and licenses granted by the author.
204. Execution of transfers of copyright ownership.
205. Recordation of transfers and other documents.

§ 201. Ownership of copyright

(*a*) *Initial Ownership.—Copyright in work protected under this* *title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.*

(*b*) WORKS MADE FOR HIRE.—*In the case of a work made for hire, the employer or other persons for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.*

(*c*) CONTRIBUTIONS TO COLLECTIVE WORKS.—*Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.*

(*d*) TRANSFER OF OWNERSHIP.—

(*1*) *The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of interstate succession.*

(*2*) *Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.*

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first *fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.*

§ 203. Termination of transfers and licenses granted by the author

(a) CONDITIONS FOR TERMINATION.—*In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1975, otherwise than by will, is subject to termination under the following conditions:*

(1) *In the case of a grant executed by one author, termination of the grant may be effected by that author or, if he is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, his termination interest may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of his interest.*

(2) *Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow (or her widower) and children or grandchildren as follows:*

(A) *The widow (or widower) owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow (or widower) owns one half of the author's interest;*

(B) *The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow (or widower), in which case the ownership of one half of the author's interest is divided among them;*

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of his children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or his successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) EFFECT OF TERMINATION.—Upon the effective date of termination, all rights under this title that were covered by the terminated

grant revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him, his legal representatives, legatees, or heirs at law represent him for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the

original grantee or his successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

§204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or his duly authorized agent.

(b) A certificate of acknowledgement is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if:

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

§ 205. Recordation of transfers and other documents

(a) CONDITIONS FOR RECORDATION.—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original signed, document.

(b) CERTIFICATE OF RECORDATION.—The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and

of the fee provided by section 708, record the document and return it with a certificate of recordation.

(c) RECORDATION AS CONSTRUCTIVE NOTICE.—Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if:

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of a transfer to the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which he claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

(e) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c) within one month after its execution in the United States or within two months after its execution abroad, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(f) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NONEXCLUSIVE LICENSE.—A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or his duly authorized agent, and if:

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

Chapter 3.—DURATION OF COPYRIGHT

Sec.

301. Pre-emption with respect to other laws.
302. Duration of copyright: Works created on or after January 1, 1975.
303. Duration of copyright: Works created but not published or copyrighted before January 1, 1975.
304. Duration of copyright: Subsisting copyrights.
305. Duration of copyright: Terminal date.

§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1975, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression;

(2) any cause of action arising from undertakings commenced before January 1, 1975;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

§ 302. Duration of copyright: Works created on or after January 1, 1975

(a) In General.—Copyright in a work created on or after January 1, 1975, subsists from its creation and, except as provided by the

following subsections, endures for a term consisting of the life of the author and fifty years after his death.

(*b*) *JOINT WORKS.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after his death.*

(*c*) *ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.—In the case of an anonymous work, a pseudonymous work or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsection* (*a*) *or* (*d*) *of section 407, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsections* (*a*) *or* (*b*), *based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of his interest, the source of his information, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.*

(*d*) *RECORDS RELATING TO DEATH OF AUTHORS.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of his interest, and the source of his information, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall* *maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent he considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.*

(e) PRESUMPTION AS TO AUTHOR'S DEATH.—After a period of seventy-five years from the year of first publication of a work, or a period of one hundred years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than fifty years before, is entitled to the benefit of a presumption that the author has been dead for a least fifty years. Reliance in good faith upon this presumption shall be complete defense to any action for infringement under this title.

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1975

Copyright in a work created before January 1, 1975, but not theretofore in the public domain or copyrighted, subsists from January 1, 1975, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 1999; and, if the work is published on or before December 31, 1999, the term of copyright shall not expire before December 31, 2024.

§ 304. Duration of copyright: Subsisting copyrights

(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1975.—Any copyright, the first term of which is subsisting on January 1, 1975, shall endure for twenty-eight years from the date it was originally secured: Provided, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be en-

titled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

(b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1975.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1973, and December 31, 1974, inclusive, or for which renewal registration is made between December 31, 1973, and December 31, 1974, inclusive, is extended to endure for a term of 75 years from the date copyright was originally secured.

(c) Termination of Transfers and Licenses Covering Extended Renewal Term.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1975, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or of any right under it, executed before January 1, 1975, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by

will, is subject to termination under the following condition:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow (or her widower) and children or grandchildren as follows:

(A) The widow (or widower) owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow (or widower) owns one half of the author's interest;

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow (or widower), in which case the ownership of one half of the author's interest is divided among them;

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of his children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1975, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or his successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by him or his duly authorized agent or, if he is dead, by the number and proportion of the owners of his termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if he is dead, to the persons owning his termination interest under clause

(2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where an author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him, his legal representatives, legatees, or heirs at law represent him for purposes of this subclass.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid

only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this [subsection, or between the persons provided by subclause (C)] of this clause, and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

§ 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

Chapter 4.—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

Sec.
401. Notice of copyright: Visually perceptible copies.
402. Notice of copyright: Phonorecords of sound recordings.
403. Notice of copyright: Publications incorporating United States Government works.
404. Notice of copyright: Contributions to collective works.
405. Notice of copyright: Omission of notice.
406. Notice of copyright: Error in name or date.
407. Deposit of copies or phonorecords for Library of Congress.
408. Copyright registration in general.
409. Application for registration.
410. Registration of claim and issuance of certificate.
411. Registration as prerequisite to infringement suit.
412. Registration as prerequisite to certain remedies for infringement.

§ 401. Notice of copyright: Visually perceptible copies

(a) GENERAL REQUIREMENT.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section

shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(*b*) FORM OF NOTICE.—*The notice appearing on the copies shall consist of the following three elements:*

(*1*) *the symbol © (the letter C in a circle), the word "Copyright," or the abbreviation "Copr.";*

(*2*) *the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles;*

(*3*) *the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.*

(*c*) POSITION OF NOTICE.—*The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.*

§ *402. Notice of copyright: Phonorecords of sound recordings*

(*a*) GENERAL REQUIREMENT.—*Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed phonorecords of the sound recording.*

(*b*) FORM OF NOTICE.—*The notice appearing on the phonorecords shall consist of the following three elements:*

(*1*) *the symbol ℗ (the letter P in a circle);*

(*2*) *the year of first publication of the sound recording;*

(3) *the name of the owner of copyrights in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.*

(c) POSITION OF NOTICE.—*The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.*

§ 403. Notice of copyright: Publicaiions incorporating United States Government works

Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by section 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

§ 404. Notice of Copyright: Contributions to collective works

(*a*) *A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 through 403. However, a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements of sections 401 through 403 with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.*

(*b*) *Where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 406(a).*

§ 405. Notice of copyright: Omission of notice

(a) Effect of Omission on Copyright.—The omission of the copyright notice described by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if:

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

(b) Effect of Omission on Innocent Infringers.—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work had been made under section 408, if he proves that he was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the infringer to continue his undertaking, that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

(c) Removal of Notice.—Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies of phonorecords.

§ 406. Notice of copyright: Error in name or date

(a) ERROR IN NAME.—Where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if he proves that he was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun:

(1) registration for the work had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.

The person named in the notice is liable to account to the copyright owner for all receipts from purported transfers or licenses made by him under the copyright.

(b) ERROR IN DATE.—When the year date in the notice on copies or phonorecords distributed by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.

(c) OMISSION OF NAME OR DATE.—Where copies or phonorecords publicly distributed by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405.

§ 407. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), the owner of copyright or of the exclusive right of publication in a work published with no-

tice of copyright in the United States shall deposit, within three months after the date of such publication:

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually-perceptible material published with such phonorecords.

This deposit is not a condition of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy of phonorecord with respect to any categories.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable:

(1) to a fine of not more than $250 for each work; and

(2) to pay to the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them.

§ 408. Copyright registration in general

(a) REGISTRATION PERMISSIVE.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified

by sections 409 and 708. Subject to the provisions of section 405(a), such registration is not a condition of copyright protection.

(b) Deposit for Copyright Registration.—Except as provided by subsection (c), the material deposited for registration shall include:

(1) in the case of an unpublished work, one complete copy or phonorecord;

(2) in the case of a published work, two complete copies or phonorecords of the best edition;

(3) in the case of a work first published abroad, one complete copy or phonorecord as so published;

(4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require.

(c) Administrative Classification and Optional Deposit.—The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(d) Corrections and Amplifications.—The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such

application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) PUBLISHED EDITION OF PREVIOUSLY REGISTERED WORK.—*Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.*

§ 409. Application for registration

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include:

(1) the name and address of the copyright claimant;

(2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors and, if one or more of the authors is dead, the dates of their deaths;

(3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;

(4) in the case of a work made for hire, a statement to this effect;

(5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;

(6) the title of the work, together with any previous or alternative titles under which the work can be identified;

(7) the year in which creation of the work was completed;

(8) if the work has been published, the date and nation of its first publication;

(9) in the case of a compilation or derivative work, an identification of any pre-existing work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered;

(10) in the case of a published work containing material of which copies are required by section 601 to be manufactured in

the United States, the names of the persons or organizations who performed the processes specified by subsection (c) of section 601 with respect to that material, and the places where those processes were performed; and

(11) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

§ *410.* Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, he shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, he shall refuse registration and shall notify the applicant in writing of the reasons for his action.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

§ 411. Registration as prerequisite to infringement suit

(a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his option, become a party to the action with respect to the issue of registrability of the copyright claim by entering his appearance within sixty days after such service, but his failure to do so shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work within three months after its first transmission.

§ 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for:

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after its first publication.

Chapter 5.—COPYRIGHT INFRINGEMENT AND REMEDIES

Sec.
501. Infringement of copyright.
502. Remedies for infringement: Injunctions.
503. Remedies for infringement: Impounding and disposition of infringing articles.
504. Remedies for infringement: Damages and profits.
505. Remedies for infringement: Costs and attorney's fees.
506. Criminal offenses.
507. Limitations on actions.
508. Notification of filing and determination of actions.

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 117, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411, to institute an action for any infringement of that particular right committed while he is the owner of it. The court may require him to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such

secondary transmission occurs within the local service area of that television station.

§ 502. Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in his office.

§ 503. Remedies for infringement: Impounding and disposition of infringing articles

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

§ 504. Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either:

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS.—*The copyright owner is entitled to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his deductible expenses and the elements of profit attributable to factors other than the copyrighted work.*

(c) STATUTORY DAMAGES.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $250 or more than $10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that he was not aware and had no reason to believe that his acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100. In a case where an instructor, librarian or archivist in a nonprofit educational institution, library, or archives, who infringed by reproducing a copyrighted work in copies or phonorecords, sustains the burden of proving that he

believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

§ 506. Criminal offenses

(a) CRIMINAL INFRINGEMENT.—*Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $2,500 or imprisoned not more than one year, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than three years, or both, for any subsequent offense, provided however, that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1) and (3) in Section 106 shall be fined not more than $25,000 or imprisoned for not more than three years, or both, for the first such offense and shall be fined not more than $50,000 or imprisoned not more than seven years, or both, for any subsequent offense.*

(b) FRAUDULENT COPYRIGHT NOTICE.—*Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that he knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that he knows to be false, shall be fined not more than $2,500.*

(c) FRAUDULENT REMOVAL OF COPYRIGHT NOTICE.—*Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.*

(d) FALSE REPRESENTATION.—*Any person who knowingly makes a* *false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.*

§ 507. Limitations on actions

(a) CRIMINAL PROCEEDINGS.—No criminal proceeding shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose.

(b) CIVIL ACTIONS.—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

§ 508. Notification of filing and determination of actions

(a) Within one month after the filing of any action under this title, the clerks of the courts of the United States shall send written notification to the Register of Copyrights setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the title, author, and registration number of each work involved in the action. If any other copyrighted work is later included in the action by amendment, answer, or other pleading, the clerk shall also send a notification concerning it to the Register within one month after the pleading is filed.

(b) Within one month after any final order or judgment is issued in the case, the clerk of the court shall notify the Register of it, sending him a copy of the order or judgment together with the written opinion, if any, of the court.

(c) Upon receiving the notifications specified in this section, the Register shall make them a part of the public records of the Copyright Office.

Chapter 6.—MANUFACTURING REQUIREMENT AND IMPORTATION

Sec.
601. Manufacture, importation, and public distribution of certain copies.
602. Infringing importation of copies or phonorecords.
603. Importation prohibitions: Enforcement and disposition of excluded articles.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.

(b) The provisions of subsection (a) do not apply:

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a national nor a domiciliary of the United States or, if he is a national of the United States, has been domiciled outside of the United States for a continuous period of at least one year immediately preceding that date; in the case of work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise;

(2) where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than two thousand copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by him at the time of registration for the work under section 408 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the government of the United States or of any State or political subdivision of a State;

(4) where importation, for use and not for sale, is sought:

(A) by any person with respect to no more than one copy of any one work at any one time;

(B) by any person arriving from abroad, with respect to copies forming part of his personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library;

(5) where the copies are reproduced in raised characters for the use of the blind;

(6) where, in addition to copies imported under clauses (3) and (4) of this subsection, no more than two thousand copies of any one such work, which have not been manufactured in the United States or Canada, are publicly distributed in the United States.

(c) The requirement of this section that copies be manufactured in the United States or Canada is satisfied if:

(1) in the case where the copies are printed directly from type that has been set, or directly from plates made from such type, the setting of the type and the making of the plates have been performed in the United States or Canada; or

(2) in the case where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies, the making of the plates has been performed in the United States or Canada; and

(3) in any case, the printing or other final process of producing multiple copies and any binding of the copies have been performed in the United States or Canada.

(d) Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any civil action or criminal proceeding for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense with respect to all of the nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material, if he proves:

(1) that copies of the work have been imported into or publicly distributed in the United States in violation of this section by or with the authority of the owner of such exclusive rights, and

(2) that the infringing copies were manufactured in the United States or Canada in accordance with the provisions of subsection (c); and

(3) that the infringement was commenced before the effective date of registration for an authorized edition of the work, the copies of which have been manufactured in the United States or Canada in accordance with the provisions of subsection (c).

(e) In any action for infringement of the exclusive rights to reproduce and distribute copies of a work containing material required by this section to be manufactured in the United States or Canada, the copyright owner shall set forth in the complaint the names of the persons or organizations who performed the processes specified by subsection (c) with respect to that material, and the places where those processes were performed.

§ 602. Infringing importation of copies or phonorecords

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired abroad is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to:

(1) importation of copies or phonorecords under the authority or for the use of the government of the United States or of any State or political subdivision of a State but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;

(2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from abroad with respect to copies or phonorecords forming part of his personal baggage; or

(3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes.

(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the Bureau of Customs has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Bureau of the importation of articles that appear to be copies or phonorecords of the work.

§ 603. Importation prohibitions: Enforcement and disposition of excluded articles

(a) The Secretary of the Treasury and the Postmaster General shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

(b) These regulations may require, as a condition for the exclusion of articles under section 602:

(1) that the person seeking exclusion obtain a court order enjoining importation of the articles; or

(2) that he furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which he claims an interest is valid and that the importation would violate the prohibition in section 602; he may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(c) Articles imported in violation of the importation prohibitions

of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his acts constituted a violation of law.

Chapter 7.—COPYRIGHT OFFICE

Sec.
701. *The Copyright Office: General responsibilities and organization.*
702. *Copyright Office regulations.*
703. *Effective date of actions in Copyright Office.*
704. *Retention and disposition of articles deposited in Copyright Office.*
705. *Copyright Office records: Preparation, maintenance, public inspection, and searching.*
706. *Copies of Copyright Office records.*
707. *Coparight Office forms and publications.*
708. *Copyright Office fees.*
709. *Delay in delivery caused by disruption of postal or other services.*

§701. The Copyright Office: General responsibilities and organization

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office in the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under his general direction and supervision.

(b) The Register of Copyrights shall adopt a seal to be used on and after January 1, 1975, to authenticate all certified documents issued by the Copyright Office

(c) The Register of Copyrights shall make an annual report to the Librarian of Congress of the work and accomplishments of the Copyright Office during the previous fiscal year. The annual report of the Register of Copyrights shall be published separately and as a part of the annual report of the Librarian of Congress.

§ 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

§ 703. Effective date of actions in Copyright Office

In any case in which time limits are prescribed under this title for the performance of an action in the Copyright Office, and in which the last day of the prescribed period falls on a Saturday, Sunday, holiday or other non-business day within the District of Columbia or the Federal Government, the action may be taken on the next succeeding business day, and is effective as of the date when the period expired.

§ 704. Retention and disposition of articles deposited in Copyright Office

(a) Upon their deposit in the Copyright Office under sections 407 and 408, all copies, phonorecords, and identifying material, including those deposited in connection with claims that have been refused registration, are the property of the United States Government.

(b) In the case of published works, all copies, phonorecords, and identifying material deposited are available to the Library of Congress for its collections, or for exchange or transfer to any other library. In the case of unpublished works, the Library is entitled to select any deposits for its collections.

(c) Deposits not selected by the Library under subsection (b), or identifying portions or reproductions of them, shall be retained under the control of the Copyright Office, including retention in Government storage facilities, for the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress. After that period it is within the joint discretion of the Register and the Librarian to order their destruction or other disposition; but, in the case of unpublished works, no deposit shall be de-

stroyed or otherwise disposed of during its term of copyright.

(d) The depositor of copies, phonorecords, or identifying material under section 408, or the copyright owner of record, may request retention, under the control of the Copyright Office, of one or more of such articles for the full term of copyright in the work. The Register of Copyrights shall prescribe, by regulation, the conditions under which such requests are to be made and granted, and shall fix the fee to be charged under section 708(a)(12) if the request is granted.

§ 705. Copyright Office records: Preparation, maintenance, public inspection, and searching

(a) The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordations, and other actions taken under this title, and shall prepare indexes of all such records.

(b) Such records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office, shall be open to public inspection.

(c) Upon request and payment of the fee specified by section 708, the Copyright Office shall make a search of its public records, indexes, and deposits, and shall furnish a report of the information they disclose with respect to any particular deposits, registrations, or recorded documents.

§ 706. Copies of Copyright Office records

(a) Copies may be made of any public records or indexes of the Copyright Office; additional certificates of copyright registration and copies of any public records or indexes may be furnished upon request and payment of the fees specified by section 708.

(b) Copies or reproductions of deposited articles retained under the control of the Copyright Office shall be authorized or furnished only under the conditions specified by the Copyright Office regulations.

§ 707. Copyright Office forms and publications

(a) Catalog of Copyright Entries.—The Register of Copyrights shall compile and publish at periodic intervals catalogs of all copy-

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right registrations. These catalogs shall be divided into parts in accordance with the various classes of works, and the Register has discretion to determine on the basis of practicability and usefulness, the form and frequency of publication of each particular part.

(b) OTHER PUBLICATIONS.—The Register shall furnish, free of charge upon request, application forms for copyright registration and general informational material in connection with the functions of the Copyright Office. He also has authority to publish compilations of information, bibliographies, and other material he considers to be of value to the public.

(c) DISTRIBUTION OF PUBLICATIONS.—All publications of the Copyright Office shall be furnished to depository libraries as specified under section 1905 of title 44, United States Code, and, aside from those furnished free of charge, shall be offered for sale to the public at prices based on the cost of reproduction and distribution.

§ 708. Copyright Office fees

(a) The following fees shall be paid to the Register of Copyrights:

(1) for the registration of a copyright claim or a supplementary registration under section 408, including the issuance of a certificate of registration, $6;

(2) for the registration of a claim to renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration, $4;

(3) for the issuance of a receipt for a deposit under section 407, $2;

(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document of six pages or less, covering no more than one title, $5; for each page over six and for each title over one, 50 cents additional;

(5) for the filing, under section 115(b), of a notice of intention to make phonorecords, $3;

(6) for the recordation, under section 302(c), of a statement revealing the identity of an author of an anonymous or pseu-

donymous work, or for the recordation, under section 302(d), of a statement relating to the death of an author, $5 for a document of six pages or less, covering no more than one title; for each page over six and for each title over one, 50 cents additional;

(7) for the issuance, under section 601, of an import statement, $3;

(8) for the issuance, under section 706, of an additional certificate of registration, $2;

(9) for the issuance of any other certification, $3; the Register of Copyrights has discretion, on the basis of their cost, to fix the fees for preparing copies of Copyright Office records, whether they are to be certified or not;

(10) for the making and reporting of a search as provided by section 705, and for any related services, $5 for each hour or fraction of an hour consumed;

(11) for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

(b) The fees prescribed by or under this section are applicable to the United States Government and any of its agencies, employees, or officers, but the Register of Copyrights has discretion to waive the requirement of this subsection in occasional or isolated cases involving relatively small amounts.

§ 709. Delay in delivery caused by disruption of postal or other services

In any case in which the Register of Copyrights determines, on the basis of such evidence as he may by regulation require, that a deposit, application, fee, or any other material to be delivered to the Copyright Office by a particular date, would have been received in the Copyright Office in due time except for a general disruption or suspension of postal or other transportation or communications services, the actual receipt of such material in the Copyright Office within one month after *the date on which the Register determines that the disruption or suspension of such services has terminated, shall be considered timely.*

Chapter 8.—COPYRIGHT ROYALTY TRIBUNAL

Sec.
801. Copyright Royalty Tribunal; Establishment and purpose.
802. Petitions for the adjustment of royalty rates.
803. Membership of the Tribunal.
804. Procedures of the Tribunal.
805. Compensation of members of the Tribunal; expenses of the Tribunal.
806. Reports to the Congress.
807. Effective date of royalty adjustment.
808. Effective date of royalty distribution.
809. Judicial review.

§ 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created in the Library of Congress a Copyright Royalty Tribunal.

(b) Subject to the provisions of this chapter, the purpose of the Tribunal shall be: (1) to make determinations concerning the adjustment of the copyright royalty rates specified by sections 111, 114, 115, and 116 so as to assure that such rates are reasonable and in the event that the Tribunal shall determine that the statutory royalty rate, or a rate previously established by the Tribunal, or the revenue basis in respect to section 111, does not provide a reasonable royalty fee for the basic service of providing secondary transmissions of the primary broadcast transmitter or is otherwise unreasonable, the Tribunal may change the royalty rate or the revenue bases on which the royalty fee shall be assessed or both so as to assure a reasonable royalty fee; and (2) to determine in certain circumstances the distribution of the royalty fees deposited with the Register of Copyrights under sections 111, 114, and 116.

§ 802. Petitions for the adjustment of royalty rates

(a) On July 1, 1975, the Register of Copyrights shall cause to be published in the Federal Register notice of the commencement of proceedings for the review of the royalty rates specified by sections 111, 114, 115 and 116.

(b) During the calendar year 1982, and in each subsequent fifth calendar year, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Register of Copyrights declaring that the petitioner requests an adjustment of the rate. The Register shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that the petitioner has a significant interest, he shall cause notice of his decision to be published in the Federal Register.

§ 803. Membership of the Tribunal

(a) In accordance with Section 802, or upon certifying the existence of a controversy concerning the distribution of royalty fees deposited pursuant to sections 111, 114 and 116, the Register shall request the American Arbitration Association or any similar successor organization to furnish a list of three members of said Association. The Register shall communicate the names together with such information as may be appropriate to all parties of interest. Any such party within twenty days from the date said communication is sent may submit to the Register written objections to any or all of the proposed names. If no such objections are received, or if the Register determines that said objections are not well founded, he shall certify the appointment of the three designated individuals to constitute a panel of the Tribunal for the consideration of the specified rate or royalty distribution. Such panel shall function as the Tribunal established in section 801. If the Register determines that the objections to the designation of one or more of the proposed individuals are well founded, the Register shall request the American Arbitration Association or any similar successor organization to propose the necessary number of substitute individuals. Upon receiving such additional names the Register shall constitute the panel. The Register shall designate one member of the panel as Chairman.

(b) If any member of a panel becomes unable to perform his duties, the Register, after consultation with the parties, may provide for the selection of a successor in the manner prescribed in subsection (a).

§ 804. Procedures of the Tribunal

(a) The Tribunal shall fix a time and place for its proceedings and shall cause notice to be given to the parties.

(b) Any organization or person entitled to participate in the proceedings may appear directly or be represented by counsel.

(c) Except as otherwise provided by law, the Tribunal shall determine its own procedure. For the purpose of carrying out the provisions of this chapter, the Tribunal may hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documents.

(d) Every final decision of the Tribunal shall be in writing and shall state the reasons therefor.

(e) The Tribunal shall render a final decision in each proceeding within one year from the certification of the panel. Upon a showing of good cause, the Senate Committee on the Judiciary and the House of Representatives Committee on the Judiciary may waive this requirement in a particular proceeding.

§ 805. Compensation of members of the Tribunal; expenses of the Tribunal

(a) In proceedings for the distribution of royalty fees, the compensation of members of the Tribunal and other expenses of the Tribunal shall be deducted prior to the distribution of the funds.

(b) In proceedings for the adjustment of royalty rates, there is hereby authorized to be appropriated such sums as may be necessary.

(c) The Library of Congress is authorized to furnish facilities and incidental service to the Tribunal.

(d) The Tribunal is authorized to procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

§ 806. Reports to the Congress

The Tribunal immediately upon making a final determination in any proceeding for adjustment of a statutory royalty shall transmit its decision, together with the reasons therefor, to the Secretary of the Senate and the Clerk of the House of Representatives for reference to the Judiciary Committees of the Senate and the House of Representatives.

§ 807. Effective date of royalty adjustment

(a) Prior to the expiration of the first period of ninety calendar days of continuous session of the Congress, following the transmittal of the report specified in section 806, either House of the Congress may adopt a resolution stating in substance that the House does not favor the recommended royalty adjustment, and such adjustment, therefore, shall not become effective.

(b) For the purposes of subsection (a) of this section

(1) Continuity of session shall be considered as broken only by an adjournment of the Congress sine die, and

(2) In the computation of the ninety-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than three days to a day certain.

(c) In the absence of the passage of such a resolution by either House during said ninety-day period, the final determination by the Tribunal of a petition for adjustment shall take effect on the first day following ninety calendar days after the expiration of the period specified by subsection (a).

(d) The Register of Copyrights shall give notice of such effective date by publication in the Federal Registe[illegible]ot less than sixty days before said date.

§ 808. Effective date of royalty distribution

A final determination of the Tribunal concerning the distribution of royalty fees deposited with the Register of Copyrights pursuant to sections 111, 114, and 116 shall become effective thirty days following such determination unless prior to that time an application has been *filed pursuant to section 809 to vacate, modify or correct the determination, and notice of such application has been served upon the Register of Copyrights. The Register upon the expiration of thirty days shall distribute such royalty fees not subject to any application filed pursuant to section 809.*

§ 809. Judicial review

In any of the following cases the United States District Court for the District of Columbia may make an order vacating, modifying or correcting a final determination of the Tribunal concerning the distribution of royalty fees—

(a) Where the determination was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in any member of the panel.

(c) Where any member of the panel was guilty of any misconduct by which the rights of any party have been prejudiced.

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

Sec. 102. This title becomes effective on January 1, 1975, except as otherwise provided by section 304(b) of title 17 as amended by this title.

Sec. 103. This title does not provide copyright protection for any work that goes into the public domain before January 1, 1975. The exclusive rights, as provided by section 106 of title 17 as amended by this title, to reproduce a work in phonorecords and to distribute phonorecords of the work, do not extend to any nondramatic musical work copyrighted before July 1, 1909.

Sec. 104. All proclamations issued by the President under sections 1(e) or 9(b) of title 17 as it existed on December 31, 1974, or under previous copyright statutes of the United States shall continue in force until terminated, suspended, or revised by the President.

Sec. 105. (a)(1) Section 505 of title 44, United States Code, Supplement IV, is amended to read as follows:

"§ 505. Sale of duplicate plates

"The Public Printer shall sell, under regulations of the Joint Committee on Printing to persons who may apply, additional or duplicate stereotype or electrotype plates from which a Government publication is printed, at a price not to exceed the cost of composition, the metal, and making to the Government, plus 10 per centum, and the full amount of the price shall be paid when the order is filed."

(2) The item relating to section 505 in the sectional analysis at the beginning of chapter 5 of title 44, United States Code, is amended to read as follows:

"505. Sale of duplicate plates."

(b) Section 2113 of title 44, United States Code, is amended to read as follows:

"§ 2113. Limitation on liability

"When letters and other intellectual productions (exclusive of patented material, published works under copyright protection, and unpublished works for which copyright registration has been made) come into the custody or possession of the Administrator of General Services, the United States or its agents are not liable for infringement of copyright or analogous rights arising out of use of the materials for display, inspection, research, reproduction, or other purposes."

(c) In section 1498(b) of title 28 of the United States Code, the phrase "section 101 (b) of title 17" is amended to read "section 504(c) of title 17".

(d) Section 543(a)(4) of the Internal Revenue Code of 1954, as amended, is amended by striking out "(other than by reason of section 2 or 6 thereof)".

(e) Section 3202(a) of title 39 of the United States Code is amended by striking out clause (5). Section 3206(c) of title 39 of the United States Code is amended by striking out clause (c). Section 3206(d) is renumbered (c).

(f) In section 6 of the Standard Reference Data Act (section 290(e) of title 15 of the United States Code, Supplement IV), sub-

section (a) is amended to delete the reference to "section 8" and to substitute therefor the phrase "section 105".

SEC. 106. In any case where, before January 1, 1975, a person has lawfully made parts of instruments serving to reproduce mechanically a copyrighted work under the compulsory license provisions of section 1(e) of title 17 as it existed on December 31, 1974, he may continue to make and distribute such parts embodying the same mechanical reproduction without obtaining a new compulsory license under the terms of section 115 of title 17 as amended by this title. However, such parts made on or after January 1, 1975, constitute phonorecords and are otherwise subject to the provisions of said section 115.

SEC. 107. In the case of any work in which an ad interim copyright is subsisting or is capable of being secured on December 31, 1974, under section 22 of title 17 as it existed on that date, copyright protection is hereby extended to endure for the term or terms provided by section 304 of title 17 as amended by this title.

SEC. 108. The notice provisions of sections 401 through 403 of title 17 as amended by this title apply to all copies or phonorecords publicly distributed on or after January 1, 1975. However, in the case of a work published before January 1, 1975, compliance with the notice provisions of title 17 either as it existed on December 31, 1974, or as amended by this title, is adequate with respect to copies publicly distributed after December 31, 1974.

SEC. 109. The registration of claims to copyright for which the required deposit, application, and fee were received in the Copyright Office before January 1, 1975, and the recordation of assignments of copyright or other instruments received in the Copyright Office before January 1, 1975, shall be made in accordance with title 17 as it existed on December 31, 1974.

SEC. 110. The demand and penalty provisions of section 14 of title 17 as it existed on December 31, 1974, apply to any work in which copyright has been secured by publication with notice of copyright on or *before that date, but any deposit and registration made after that date in response to a demand under that section shall be made in accordance with the provisions of title 17 as amended by this title.*

SEC. 111. Section 2318 of title 18 of the United States Code is amended to read as follows:

"§ 2318. Transportation, sale or receipt of phonograph records bearing forged or counterfeit labels

"Whoever knowingly and with fraudulent intent transports, causes to be transported, receives, sells, or offers for sale in interstate or foreign commerce any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, to which or upon which is stamped, pasted, or affixed any forged or counterfeited label, knowing the label to have been falsely made, forged, or counterfeited shall be fined not more than $25,000 or imprisoned for not more than three years, or both, for the first such offense and shall be fined not more than $50,000 or imprisoned not more than seven years or both, for any subsequent offense."

SEC. 112. All causes of action that arose under title 17 before January 1, 1975, shall be governed by title 17 as it existed when the cause of action arose.

SEC. 113. If any provision of title 17, as amended by this title, is declared unconstitutional, the validity of the remainder of the title is not affected.

TITLE II—NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

ESTABLISHMENT AND PURPOSE OF COMMISSION

SEC. 201. (a) There is hereby created in the Library of Congress a National Commission on New Technological Uses of Copyrighted Works (hereafter called the Commission).

(b) The purpose of the Commission is to study and compile data on:

(1) the reproduction and use of copyrighted works of authorship—

(A) in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and

(B) by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities; and

(2) the creation of new works by the application or intervention of such automatic systems or machine reproduction.

(c) The Commission shall make recommendations as to such changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners.

MEMBERSHIP OF THE COMMISSION

SEC. 202. (a) The Commission shall be composed of thirteen voting members, appointed as follows:

(1) Four members, to be appointed by the President, selected from authors and other copyright owners;

(2) Four members, to be appointed by the President, selected from users of copyright works;

(3) Four nongovernmental members to be appointed by the President, selected from the public generally;

(4) The Librarian of Congress.

(b) The President shall appoint a Chairman, and a Vice Chairman who shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office, from among the four members selected from the public generally, as provided by clause (3) of subsection (a). The Register of Copyrights shall serve ex officio as a nonvoting member of the Commission.

(c) Seven voting members of the Commission shall constitute a quorum.

(d) Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner as the original appointment was made.

COMPENSATION OF MEMBERS OF COMMISSIONS

SEC. 203. (a) Members of the Commission, other than officers or employees of the Federal Government, shall receive compensation at *the rate of $100 per day while engaged in the actual performance of Commission duties, plus reimbursement for travel, subsistence, and other necessary expenses in connection with such duties.*

(b) Any members of the Commission who are officers or employees of the Federal Government shall serve on the Commission without compensation, but such members shall be reimbursed for travel, subsistence, and other necessary expenses in connection with the performance of their duties.

STAFF

SEC. 204. (a) To assist in its studies, the Commission may appoint a staff which shall be an administrative part of the Library of Congress. The staff shall be headed by an Executive Director, who shall be responsible to the Commission for the administration of the duties entrusted to the staff.

(b) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $100 per day.

EXPENSES OF THE COMMISSION

SEC. 205. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

REPORTS

SEC. 206. (a) Within one year after the first meeting of the Commission it shall submit to the President and the Congress a preliminary report on its activities.

(b) Within three years after the enactment of this Act the Commission shall submit to the President and the Congress a final report on its study and investigation which shall include its recommendations and such proposals for legislation and administrative action as may be necessary to carry out its recommendations.

(c) In addition to the preliminary report and final report required by this section, the Commission may publish such interim reports as it may determine, including but not limited to consultant's reports, transcripts of testimony, seminar reports, and other Commission findings.

POWERS OF THE COMMISSION

SEC. 207. (a) The Commission or, with the authorization of the Commission, any three or more of its members, may, for the purpose of carrying out the provisions of this title, hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documentary material.

(b) With the consent of the Commission, any of its members may hold any meetings, seminars, or conferences considered appropriate to provide a forum for discussion of the problems with which it is dealing.

TERMINATION

SEC. 208. On the sixtieth day after the date of the submission of its final report, the Commission shall terminate and all offices and employment under it shall expire.

TITLE III—PROTECTION OF ORNAMENTAL DESIGNS OF USEFUL ARTICLES

DESIGNS PROTECTED

SEC. 301. (a) The author or other proprietor of an original ornamental design of a useful article may secure the protection provided by this title upon complying with and subject to the provisions hereof.

(b) For the purposes of this title—

(1) A "useful article" is an article which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article which normally is a part of a useful article shall be deemed to be a useful article.

(2) The "design of a useful article", hereinafter referred to as a "design", consists of those aspects or elements of the article, including its two-dimensional or three-dimensional features of shape and surface, which make up the appearance of the article.

(3) A design is "ornamental" if it is intended to make the article attractive or distinct in appearance.

(4) A design is "original" if it is the independent creation of an author who did not copy it from another source.

DESIGNS NOT SUBJECT TO PROTECTION

Sec. 302. Protection under this title shall not be available for a design that is—

(a) not original;

(b) staple or commonplace, such as a standard geometric figure, familiar symbol, emblem, or motif, or other shape, pattern, or configuration which has become common, prevalent, or ordinary;

(c) different from a design excluded by subparagraph (b) above only in insignificant details or in elements which are variants commonly used in the relevant trades; or

(d) dictated solely by a utilitarian function of the article that embodies it;

(e) composed of three-dimensional features of shape and surface with respect to men's, women's, and children's apparel, including undergarments and outerwear.

REVISIONS, ADAPTATIONS, AND REARRANGEMENTS

Sec. 303. Protection for a design under this title shall be available notwithstanding the employment in the design of subject matter excluded from protection under section 302, if the design is a substantial revision, adaptation, or rearrangement of said subject matter: Provided, That such protection shall be available to a design employing subject matter protected under title I of this Act, or title 35 of the United States Code or this title, only if such protected subject matter is employed with the consent of the proprietor thereof. Such protection shall be independent of any subsisting protection in subject matter employed in the design, and shall not be construed as securing any right to subject matter excluded from protection or as extending any subsisting protection.

COMMENCEMENT OF PROTECTION

Sec. 304. (a) The protection provided for a design under this title shall commence upon the date when the design is first made public.

(b) A design is made public when, by the proprietor of the design or with his consent, an existing useful article embodying the design

is anywhere publicly exhibited, publicly distributed, or offered for sale or sold to the public.

TERM OF PROTECTION

Sec. 305. (a) Subject to the provisions of this title, the protection herein provided for a design shall continue for a term of five years from the date of the commencement of protection as provided in section 304(a), but if a proper application for renewal is received by the Administrator during the year prior to the expiration of the five-year term, the protection herein provided shall be extended for an additional period of five years from the date of expiration of the first five years.

(b) If the design notice actually applied shows a date earlier than the date of the commencement of protection as provided in section 304(a), protection shall terminate as though the term had commenced at the earlier date.

(c) Where the distinguishing elements of a design are in substantially the same form in a number of different useful articles, the design shall be protected as to all such articles when protected as to one of them, but not more than one registration shall be required. Upon expiration or termination of protection in a particular design as provided in this title all rights under this title in said design shall terminate, regardless of the number of different articles in which the design may have been utilized during the term of its protection.

THE DESIGN NOTICE

Sec. 306. (a) Whenever any design for which protection is sought under this title is made public as provided in section 304(b), the proprietor shall, subject to the provisions of section 307, mark it or have it marked legibly with a design notice consisting of the following three elements:

(1) the words "Protected Design", the abbreviation "Prot'd Des." or the letter "D" within a circle thus Ⓓ;

(2) the year of the date on which the design was first made public; and

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(3) the name of the proprietor, an abbreviation by which the name can be recognized, or a generally accepted alternative designation of the proprietor; any distinctive identification of the proprietor may be used if it has been approved and recorded by the Administrator before the design marked with such identification is made public.

After registration the registration number may be used instead of the elements specified in (2) and (3) hereof.

(b) The notice shall be so located and applied as to give reasonable notice of design protection while the useful article embodying the design is passing through its normal channels of commerce. This requirement may be fulfilled, in the case of sheetlike or strip materials bearing repetitive or continuous designs, by application of the notice to each repetition, or to the margin, selvage, or reverse side of the material at reasonably frequent intervals, or to tags or labels affixed to the material at such intervals.

(c) When the proprietor of a design has complied with the provisions of this section, protection under this title shall not be affected by the removal, destruction, or obliteration by others of the design notice on an article.

EFFECT OF OMISSION OF NOTICE

Sec. 307. The omission of the notice prescribed in section 306 shall not cause loss of the protection or prevent recovery for infringement against any person who, after written notice of the design protection, begins an undertaking leading to infringement: Provided, *That such omission shall prevent any recovery under section 322 against a person who began an undertaking leading to infringement before receiving written notice of the design protection, and no injunction shall be had unless the proprietor of the design shall reimburse said person for any reasonable expenditure or contractual obligation in connection with such undertaking incurred before written notice of design protection, as the court in its discretion shall direct. The burden of proving written notice shall be on the proprietor.*

INFRINGEMENT

SEC. 308. (a) It shall be infringement of a design protected under this title for any person, without the consent of the proprietor of the design, within the United States or its territories or possessions and during the term of such protection, to—

(1) make, have made, or import, for sale or for use in trade, any infringing article as defined in subsection (d) hereof; or

(2) sell or distribute for sale or for use in trade any such infringing article: Provided, however, That a seller or distributor of any such article who did not make or import the same shall be deemed to be an infringer only if—

(i) he induced or acted in collusion with a manufacturer to make, or an importer to import such article (merely purchasing or giving an order to purchase in the ordinary course of business shall not of itself constitute such inducement or collusion); or

(ii) he refuses or fails upon the request of the proprietor of the design to make a prompt and full disclosure of his source of such article, and he orders or reorders such article after having received notice by registered or certified mail of the protection subsisting in the design.

(b) It shall be not infringement to make, have made, import, sell, or distribute, any article embodying a design created without knowledge of, and copying from, a protected design.

(c) A person who incorporates into his own product of manufacture an infringing article acquired from others in the ordinary course of business, or who, without knowledge of the protected design, makes or processes an infringing article for the account of another person in the ordinary course of business, shall not be deemed an infringer except under the conditions of clauses (i) and (ii) of paragraph (a)(2) of this section. Accepting an order or reorder from the source of the infringing article shall be deemed ordering or reordering within the meaning of clause (ii) of paragraph (a)(2) of this section.

(d) An "infringing article" as used herein is any article, the design of which has been copied from the protected design, without the consent of the proprietor: Provided however, That an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium shall not be deemed to be an infringing article. An article is not an infringing article if it embodies, in common with the protected design, only elements described in subsections (a) through (d) of section 302.

(e) The party alleging rights in a design in any action or proceeding shall have the burden of affirmatively establishing its originality whenever the opposing party introduces an earlier work which is identical to such design, or so similar as to make a prima facie showing that such design was copied from such work.

APPLICATION FOR REGISTRATION

Sec. 309. (a) Protection under this title shall be lost if application for registration of the design is not made within six months after the date on which the design was first made public as provided in section 304(b).

(b) Application for registration or renewal may be made by the proprietor of the design.

(c) The application for registration shall be made to the Administrator and shall state (1) the name and address of the author or authors of the design; (2) the name and address of the proprietor if different from the author; (3) the specific name of the article, indicating its utility; (4) the date when the design was first made public as provided in section 304(b); and (5) such other information as may be required by the Administrator. The application for registration may include a description setting forth the salient features of the design, but the absence of such a description shall not prevent registration under this title.

(d) The application for registration shall be accompanied by a statement under oath by the applicant or his duly authorized agent or representative, setting forth that, to the best of his knowledge and be-

lief (1) the design is original and was created by the author or authors named in the application; (2) the design has not previously been registered on behalf of the applicant or his predecessor in title; (3) the design has been made public as provided in section 304(b); and (4) the applicant is the person entitled to protection and to registration under this title. If the design has been made public with the design notice prescribed in section 306, the statement shall also describe the exact form and position of the design notice.

(e) Error in any statement or assertion as to the utility of the article named in the application, the design of which is sought to be registered, shall not affect the protection secured under this title.

(f) Errors in omitting a joint author or in naming an alleged joint author shall not affect the validity of the registration, or the actual ownership or the protection of the design: Provided, That the name of one individual who was in fact an author is stated in the application. Where the design was made within the regular scope of the author's employment and individual authorship of the design is difficult or impossible to ascribe and the application so states, the name and address of the employer for whom the design was made may be stated instead of that of the individual author.

(g) The application for registration shall be accompanied by two copies of a drawing or other pictorial representation of the useful article having one or more views, adequate to show the design, in a form and style suitable for reproduction, which shall be deemed a part of the application.

(h) Related useful articles having common design features may be included in the same application under such conditions as may be prescribed by the Administrator.

BENEFIT OF EARLIER FILING DATE IN FOREIGN COUNTRY

SEC. 310. An application for registration of a design filed in this country by any person who has, or whose legal representative or predecessor or successor in title has previously regularly filed an application for registration of the same design in a foreign country which af-

fords similar privileges in the case of applications filed in the United States or to citizens of the United States shall have the same effect as if filed in this country on the date on which the application was first filed in any such foreign country, if the application in this country is filed within six months from the earliest date on which any such foreign application was filed.

OATHS AND ACKNOWLEDGMENTS

Sec. 311. Oaths and acknowledgments required by this title may be made before any person in the United States authorized by law to administer oaths, or, when made in a foreign country, before any diplomatic or consular officer of the United States authorized to administer oaths, or before any official authorized to administer oaths in the foreign country concerned, whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States, and shall be valid if they comply with the laws of the state or country where made.

EXAMINATION OF APPLICATION AND ISSUE OR REFUSAL OF REGISTRATION

Sec. 312. (a) Upon the filing of an application for registration in proper form as provided in section 309, and upon payment of the fee provided in section 315, the Administrator shall determine whether or not the application relates to a design which on its face appears to be subject to protection under this title, and if so, he shall register the design. Registration under this subsection shall be announced by publication.

(b) If, in his judgment, the application for registration relates to a design which on its face is not subject to protection under this title, the Administrator shall send the applicant a notice of his refusal to register and the grounds therefor. Within three months from the date the notice of refusal is sent, the applicant may request, in writing, reconsideration of his application. After consideration of such a request, the Administrator shall either register the design or send the applicant a notice of his final refusal to register.

(c) Any person who believes he is or will be demaged by a registra-

tion under this title may, upon payment of the prescribed fee, apply to the Administrator at any time to cancel the registration on the ground that the design is not subject to protection under the provisions of this title, stating the reasons therefor. Upon receipt of an application for cancellation, the Administrator shall send the proprietor of the design, as shown in the records of the Office of the Administrator, a notice of said application, and the proprietor shall have a period of three months from the date such notice was mailed in which to present arguments in support of the validity of the registration. It shall also be within the authority of the Administrator to establish, by regulation, conditions under which the opposing parties may appear and be heard in support of their arguments. If, after the periods provided for the presentation of arguments have expired, the Administrator determines that the applicant for cancellation has established that the design is not subject to protection under the provisions of this title, he shall order the registration stricken from the record. Cancellation under this subsection shall be announced by publication, and notice of the Administrator's final determination with respect to any application for cancellation shall be sent to the applicant and to the proprietor of record.

(d) Remedy against a final adverse determination under subparagraphs (b) and (c) above may be had by means of a civil action against the Administrator pursuant to the provision of section 1361 of title 28, United States Code, if commenced within such time after such decision, not less than 60 days, as the Administrator appoints.

(e) When a design has been registered under this section, the lack of utility of any article in which it has been embodied shall be no defense to an infringement action under section 320, and no ground for cancellation under subsection (c) of this section or under section 323.

CERTIFICATION OF REGISTRATION

SEC. 313. Certificates of registration shall be issued in the name of the United States under the seal of the Office of the Administrator and *shall be recorded in the official records of that Office. The certificate shall state the name of the useful article, the date of filing of the application, the date on which the design was first made public as provided in section 304(b) or any earlier date as set forth in section 305(b), and shall contain a reproduction of the drawing or other pictorial representation showing the design. Where a description of the salient features of the design appears in the application, this description shall also appear in the certificate. A renewal certificate shall contain the date of renewal registration in addition to the foregoing. A certificate of initial or renewal registration shall be admitted in any court as prima facie evidence of the facts stated therein.*

PUBLICATION OF ANNOUNCEMENTS AND INDEXES

SEC. 314. (a) The Administrator shall publish lists and indexes of registered designs and cancellations thereof and may also publish the drawing or other pictorial representations of registered designs for sale or other distribution.

(b) The Administrator shall establish and maintain a file of the drawings or other pictorial representations of registered designs, which file shall be available for use by the public under such conditions as the Administrator may prescribe.

FEES

SEC. 315. (a) There shall be paid to the Administrator the following fees:

(1) On filing each application for registration or for renewal of registration of a design, $15.

(2) For each additional related article included in one application, $10.

(3) For recording assignment, $3 for the first six pages, and for each additional two pages or less, $1.

(4) For a certificate of correction of an error not the fault of the Office, $10.

(5) For certification of copies of records, $1.

(6) On filing each application for cancellation of a registration, $15.

(b) The Administrator may establish charges for materials or services furnished by the Office, not specified above, reasonably related to the cost thereof.

REGULATIONS

Sec. 316. The Administrator may establish regulations not inconsistent with law for the administration of this title.

COPIES OF RECORDS

Sec. 317. Upon payment of the prescribed fee, any person may obtain a certified copy of any official record of the Office of the Administrator, which copy shall be admissible in evidence with the same effect as the original.

CORRECTION OF ERRORS IN CERTIFICATES

Sec. 318. The Administrator may correct any error in a registration incurred through the fault of the Office, or, upon payment of the required fee, any error of a clerical or typographical nature not the fault of the Office occurring in good faith, by a certificate of correction under seal. Such registration, together with the certificate, shall thereafter have the same effect as if the same had been originally issued in such corrected form.

OWNERSHIP AND TRANSFER

Sec. 319. (a) The property right in a design subject to protection under this title shall vest in the author, the legal representatives of a deceased author or of one under legal incapacity, the employer for whom the author created the design in the case of a design made within the regular scope of the author's employment, or a person to whom the rights of the author or of such employer have been transferred. The person or persons in whom the property right is vested shall be considered the proprietor of the design.

(b) The property right in a registered design, or a design for which an application for registration has been or may be filed, may be assigned, granted, conveyed, or mortgaged by an instrument in writing, signed by the proprietor, or may be bequeathed by will.

(c) An acknowledgement as provided in section 311 shall be prima facie evidence of the execution of an assignment, grant, conveyance, or mortgage.

(d) An assignment, grant, conveyance, or mortgage shall be void as against any subsequent purchaser or mortgage for a valuable consideration, without notice, unless it is recorded in the Office of the Administrator within three months from its date of execution or prior to the date of such subsequent purchase or mortgage.

REMEDY FOR INFRINGEMENT

SEC. 320. (a) The proprietor of a design shall have remedy for infringement by civil action instituted after issuance of a certificate of registration of the design.

(b) The proprietor of a design may have judicial review of a final refusal of the Administrator to register the design, by a civil action brought as for infringement if commenced within the time specified in section 312(d), and shall have remedy for infringement by the same action if the court adjudges the design subject to protection under this title: Provided, That (1) he has previously duly filed and duly prosecuted to such final refusal an application in proper form for registration of the designs, and (2) he causes a copy of the complaint in action to be delivered to the Administrator within ten days after the commencement of the action, and (3) the defendant has committed acts in respect to the design which would constitute infringement with respect to a design protected under this title.

INJUNCTION

SEC. 321. The several courts having jurisdiction of actions under this title may grant injunctions in accordance with the principles of equity to prevent infringement, including in their discretion, prompt relief by temporary restraining orders and preliminary injunctions.

RECOVERY FOR INFRINGEMENT, AND SO FORTH

SEC. 322. (a) Upon finding for the claimant the court shall award him damages adequate to compensate for the infringement, but in no event less than the reasonable value the court shall assess them. In either event the court may increase the damages to such amount, not exceeding $5,000 or $1 per copy, whichever is greater, as to the

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court shall appear to be just. The damages awarded in any of the above circumstances shall constitute compensation and not a penalty. The court may receive expert testimony as an aid to the determination of damages.

(b) No recovery under paragraph (a) shall be had for any infringement committed more than three years prior to the filing of the complaint.

(c) The court may award reasonable attorney's fees to the prevailing party. The court may also award other expenses of suit to a defendant prevailing in an action brought under section 320(b).

(d) The court may order that all infringing articles, and any plates, molds, patterns, models, or other means specifically adapted for making the same be delivered up for destruction or other disposition as the court may direct.

POWER OF COURT OVER REGISTRATION

SEC. 323. In any action involving a design for which protection is sought under this title, the court when appropriate may order registration of a design or the cancellation of a registration. Any such order shall be certified by the court to the Administrator, who shall make appropriate entry upon the records of his Office.

LIABILITY FOR ACTION ON REGISTRATION FRAUDULENTLY OBTAINED

SEC. 324. Any person who shall bring an action for infringement knowing that registration of the design was obtained by a false or fraudulent representation materially affecting the rights under this title, shall be liable in the sum of $1,000, or such part thereof as the court may determine, as compensation to the defendant, to be charged against the plaintiff and paid to the defendant, in addition to such costs and attorney's fees of the defendant as may be assessed by the court.

PENALTY FOR FALSE MARKING

SEC. 325. (a) Whoever, for the purpose of deceiving the public, marks upon, or applies to, or uses in advertising in connection with any *article made, used, distributed, or sold by him, the design of which is not protected under this title, a design notice as specified in section 306 or any other words or symbols importing that the design is protected under this title, knowing that the design is not so protected, shall be fined not more than $500 for every such offense.*

(b) Any person may sue for the penalty, in which event, one-half shall go to the person suing and the other to the use of the United States.

PENALTY FOR FALSE REPRESENTATION

Sec. 326. Whoever knowingly makes a false representation materially affecting the rights obtainable under this title for the purpose of obtaining registration of a design under this title shall be fined not less than $500 and not more than $1,000, and any rights or privileges he may have in the design under this title shall be forfeited.

RELATION TO COPYRIGHT LAW

Sec. 327. (a) Nothing in this title shall affect any right or remedy now or hereafter held by any person under title I of this Act.

(b) When a pictorial, graphic, or sculptural work in which copyright subsists under title I of this Act is utilized in an original ornamental design of a useful article, by the copyright proprietor or under an express license from him, the design shall be eligible for protection under the provisions of this title.

RELATION TO PATENT LAW

Sec. 328. (a) Nothing in this title shall affect any right or remedy available to or held by any person under title 35 of the United States Code.

(b) The issuance of a design patent for an ornamental design for an article of manufacture under said title 35 shall terminate any protection of the design under this title.

COMMON LAW AND OTHER RIGHTS UNAFFECTED

Sec. 329. Nothing in this title shall annul or limit (1) common law or other rights or remedies, if any, available to or held by any person *with respect to a design which has not been made public as provided in section 304(b), or (2) any trademark right or right to be protected against unfair competition.*

ADMINISTRATOR

Sec. 330. The Administrator and Office of the Administrator referred to in this title shall be such officer and office as the President may designate.

SEVERABILITY CLAUSE

Sec. 331. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of the title or the application to other persons or circumstances shall not be affected thereby.

AMENDMENT OF OTHER STATUTES

Sec. 332. (a) Subdivision a(2) of section 70 of the Bankruptcy Act of July 1, 1898, as amended (11 U.S.C. 110(a)), is amended by inserting "designs," after "patent rights," and "design registration," after "application for patent,".

(b) Title 28 of the United States Code is amended—

(1) by inserting "designs," after "patents," in the first sentence of section 1338(a);

(2) by inserting ", design," after "patent" in the second sentence of section 1338(a);

(3) by inserting "design," after "copyright," in section 1338 (b);

(4) by inserting "and register designs" after "copyrights" in section 1440; and

(5) by revising section 1498(a) to read as follows:

"(a) Whenever a registered design or invention is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

BEST COPY AVAILABLE

"For the purposes of this section, the use or manufacture of a registered design or an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

"The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States, prior to, in the case of an invention, July 1, 1918, and in the case of a registered design, July 1, 1976.

"A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the registered design or invention by the Government. This section shall not confer a right of action on any registrant or patentee or any assignee of such registrant or patentee with respect to any design created by or invention discovered or invented by a person while in the employment or service of the United States, where the design or invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials, or facilities were used."

TIME OF TAKING EFFECT

SEC. 333. This title shall take effect one year after enactment of this Act.

NO RETROACTIVE EFFECT

SEC. 334. Protection under this title shall not be available for any design that has been made public as provided in section 304(b) prior to the effective date of this title.

SHORT TITLE

SEC. 335. This title may be cited as "The Design Protection Act of 1973."

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PURPOSE

The purpose of the proposed legislation, as amended, is to provide in Title I for a general revision of the United States Copyright Law, title 17 of the United States Code. Title II of the bill provides for the establishment in the Library of Congress of a National Commission on New Technological Uses of Copyrighted Works. Title III of the bill creates a new type of protection for ornamental designs of useful articles.

STATEMENT

The present Copyright Law of the United States is essentially that enacted by the Congress in 1909. Many significant developments in technology and communications have rendered that law clearly inadequate to the needs of the country today.

The enactment of legislation "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries", is one of the powers of the Congress enumerated in Article I, section 8 of the Constitution. Some commentators on the Congress in recent years have expressed concern that the legislative branch has too frequently yielded the initiative in legislative matters to the executive branch. This legislation is exclusively the product of the legislative branch and has received detailed consideration over a period of several years.

The origin of this legislation can ultimately be traced to the Legislative Appropriations Act of 1955 which appropriated funds for a comprehensive program of research and study of copyright law revision by the Copyright Office of the Library of Congress. This committee's Subcommittee on Patents, Trademarks and Copyrights published a series of 34 studies on all aspects of copyright revision, which were prepared under the supervision of the Copyright Office. In 1961 the Congress received the "Report of the Register of Copyrights on the general revision of the U.S. Copyright Law." The Copyright Office subsequently conducted a series of panel meetings on copyright law revision. On July 20, 1964, Senator John L. McClellan, Chairman of the Subcommittee on Patents, Trademarks and Copyrights, introduced, at the request of the Librarian of Congress, S. 3008 of the 88th Congress, for the general revision of the copyright law. No action was taken on this bill prior to the adjournment of the Congress.

In the 1st session of the 89th Congress, Senator McClellan, again introduced at the request of the Librarian of Congress, a general copyright revision bill S. 1006. Hearings on this legislation were commenced by the Subcommittee on August 18, 1965, and continued on August 19 and 20. When the hearings were recessed, a large number of witnesses remained to be heard. During the 2d session of the 89th Congress there were important developments relating to the possible copyright liability of cable television systems under the Copyright Act of 1909. In order to ascertain whether immediate and separate legislative action on the copyright CATV question was necessary and desirable, the Subcommittee commenced hearings on that subject on August 2, 1966. These hearings continued on August 3, 4 and 25. No further action was taken by the Subcommittee during the 89th Congress.

In the 1st session of the 90th Congress Senator McClellan again, at the request of the Librarian of Congress, introduced S. 597, for the general revision of the copyright law. Hearings on this bill commenced on March 15, 1967 and continued on March 16, 17, 20, 21, April 4, 6, 11, 12 and 28. During the Subcommittee hearings more than 100 witnesses were heard and many suggested amendments were submitted for the consideration of the Subcommittee.

On April 11, 1967, the House of Representatives passed H.R. 2512, for the general revision of the copyright law. This bill was subsequently referred to the Subcommittee on Patents, Trademarks and Copyrights. Although the Subcommittee completed the public hearings on copyright revision during the 90th Congress, no further action was taken by the Subcommittee because of problems with certain provisions of the legislation, and because of the pendency of the cable television judicial proceedings.

One of the problems that prevented Subcommittee action during the 90th Congress was uncertainty concerning the impact of the legislation on the use of copyrighted materials in computers and other forms of information storage and retrieval systems. The Subcommittee recommended and the Senate passed on October 12, 1967, S. 2216 to establish in the Library of Congress a National Commission on New Technological Uses of Copyrighted Works. The Commission was authorized to study this subject and recommend any changes in copyright law or procedure. No action was taken on this legislation by the House of Representatives.

On January 22 (legislative day January 10), 1969, Senator McClellan introduced S. 543. Title I of this bill, other than for technical amendments, was identical to S. 597 of the 90th Congress. Title II of the bill incorporated the provisions of S. 2216 providing for the establishment of the National Commission on New Technological Uses of Copyrighted Works.

On December 10, 1969, the Subcommittee favorably reported S. 543, with an amendment in the nature of a substitute. No further action was taken in the Committee on the Judiciary, primarily because of the cable television issue.

On February 18, 1971, Senator McClellan introduced S. 644 for the general revision of the copyright law. Other than for minor amendments, the text of that bill was identical to the revision bill reported by the Subcommittee in the 91st Congress. No action was taken on general revision legislation during the 92nd Congress while the Subcommittee was awaiting the formulation and adoption by the Federal Communications Commission of new cable television rules.

While action on the general revision bill was necessarily delayed, the unauthorized duplication of sound recordings became widespread. It was accordingly determined that the creation of a limited copyright in sound recordings should not await action on the general revision bill. Senator McClellan introduced, for himself and others, S. 644 of the 92nd Congress to amend title 17 of the U.S. Code to provide for the creation of a limited copyright in sound recordings. An amended version of this legislation was enacted as P.L. 92–140.

On March 26, 1973, Senator McClellan introduced S. 1361 for the general revision of the copyright law. Other than for technical amendments, this bill is identical to S. 644 of the 92nd Congress. Additional copyright revision hearings were held on July 31st and August 1, 1973. The Subcommittee conducted a total of 18 days of hearings on copyright law revision.

During the 87th Congress the Senate passed S. 1884 to provide for a new form of protection for original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. The Senate in the 88th Congress passed S. 776 and, in the 90th Congress S. 1237, bills on the same subject. No final action was taken in the House of Representatives on any of these measures. In the 91st Congress Senator Philip A. Hart introduced a similar bill, S. 1774. The substance of that bill has been incorporated as Title III of this legislation.

SECTIONAL ANALYSIS AND DISCUSSION

An analysis and discussion of the provisions of S. 1361, as amended, follows:

SECTION 101. DEFINITIONS

The significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant.

SECTION 102. GENERAL SUBJECT MATTER OF COPYRIGHT

"Original works of authorship"

The two fundamental criteria of copyright protection—originality and fixation in tangible form—are restated in the first sentence of this cornerstone provision. The phrase "original works of authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them. In using the phrase "original works of authorship," rather than "all the writings of an author" now in section 2 of the statute, the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and the constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that "all the writings of an author" under the present statute is narrower in scope than the "writings" of "authors" referred to in the Constitution. The bill avoids this dilemma by using a different phrase—"original works of authorship"—in characterizing the general subject matter of statutory copyright protection.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms—electronic music, filmstrips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by the added recognition of choreography and sound recordings, there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.

Fixation in tangible form

As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a "tangible medium of expression," and adds that this medium may be one "now known or later developed," and that the fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

Under the bill, the concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection. As will be noted in more detail in connection with section

301, an unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.

The definition of "fixed" is contained in section 101. Under the first sentence of this definition a work would be considered "fixed in a tangible medium of expression" if there has been an authorized embodiment in a copy or phonorecord and if that embodiment "is sufficiently permanent or stable" to permit the work "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The second sentence makes clear that, in the case of "a work consisting of sounds, images, or both, that are being transmitted," the work is regarded as "fixed" if a fixation is being made at the same time as the transmission.

Under this new definition, "copies" and "phonorecords" together will comprise all of the material objects in which copyrightable works are capable of being fixed. The definitions of these terms in section 101, together with their usage in section 102 and throughout the bill, reflect a fundamental distinction between the "original work" which is the product of "authorship" and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth. It is possible to have an "original work of authorship" without having a "copy" or "phonorecord" embodying it, and it is also possible to have a "copy" or "phonorecord" embodying something that does not qualify as an "original work of authorship." The two essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.

Categories of copyrightable works

The second sentence of section 102 lists seven broad categories which the concept of "works of authorship" is said to "include." The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative," and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. The items are also overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories. In the aggregate, the list covers all categories of works now copyrightable under title 17; in addition, it specifically enumerates "pantomimes and choreographic works," and it creates a new category of "sound recordings."

Of the seven items listed, four are defined in section 101. The three undefined categories—"musical works," "dramatic works," and "pantomimes and choreographic works"—have fairly settled meanings. There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute since the form of a work would no longer be of any importance, nor is it necessary to specify that "choreographic works" do not include social dance steps and simple routines.

The four items defined in section 101 are "literary works," "pictorial, graphic, and sculptural works", "motion pictures and audiovisual works", and "sound recordings." In each of these cases, definitions are needed not only because the meaning of the term itself is unsettled but also because the distinction between "work" and "material object" requires clarification. The term "literary works" does not connote any criterion of literary merit or qualitative value; it includes catalogs, directories and similar works.

Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise everything now covered by classes (f) through (k) of section 5 in the present statute, including not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) as "prints or labels used for articles of merchandise." However, since this terminology suggests the material object in which a work is embodied rather than the work itself, the bill does not mention this category separately.

In accordance with the Supreme Court's decision in *Mazer* v. *Stein*, 347 U.S. 201 (1954), works of "applied art" encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection. The scope of exclusive rights in these works is given special treatment in section 113, to be discussed below.

Enactment of PL 92–140 marked the first recognition in American copyright law of sound recordings as copyrightable works. As defined in section 101, copyrightable "sound recordings" are original works of authorship comprising an aggregate of musical, spoken, or other sounds that have been fixed in tangible form. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "phonorecords," the latter being physical objects in which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic; or musical works that may be reproduced on a "phonorecord."

As a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and the extension of limited statutory protection to them too long delayed. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the copyright protection that would prevent the reproduction and distribution of unauthorized phonorecords of sound recordings is clearly justified. The question of broader protection to include rights against public performance is discussed below in connection with section 114 of the bill.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.

Sound tracks of motion pictures, long a nebulous area in American copyright law, are specifically included in the definition of "motion pictures" and excluded in the definition of "sound recordings." "Motion pictures," as defined, requires three elements: (1) a series of images, (2) the capability of showing the images in a certain successive order, and (3) an impression of motion when the images are thus shown. Coupled with the basic requirements of original authorship and fixation in tangible form, this definition encompasses a wide range of cinematographic works embodied in films, tapes, and other media. However, it would not include: (1) unauthorized fixations of live performances or telecasts, (2) live telecasts that are not fixed simultaneously with their transmission, or (3) filmstrips and slide sets which, although consisting of a series of images intended to be shown in succession, are not capable of conveying an impression of motion.

On the other hand, the bill also equates audiovisual materials such as filmstrips, slide sets, and sets of transparencies with "motion pictures" rather than with "pictorial, graphic, and sculptural works." Their sequential showing is closer to a "performance" than to a "display," and the definition of "audiovisual works," which applies also to "motion pictures," embraces works consisting of a series of related images that are by their nature, intended for showing by means of projectors or other devices.

Nature of copyright

Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic, or artistic form in which the author expressed intellectual concepts. Section 102(b) makes clear that copyright protection does not extend to any idea, plan, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. The term "plan" in this context refers to a mental formulation for achieving something, as distinguished from a graphic representation diagramming the mental concept.

Some concern has been expressed lest copyright in computer programs should extend protection to the methodology or processes adopted by the programmer, rather than merely to the "writing" expressing his ideas. Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.

Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.

SECTION 103. COMPILATIONS AND DERIVATIVE WORKS

Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works that are entirely original and to those containing preexisting material. Section 103(b) is also intended to define, more sharply and clearly than does section 7 of the present law, the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The most important point here is one that is commonly misunderstood today: Copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

Between them the terms "compilations" and "derivative works," which are defined in section 101, comprehend every copyrightable work that employs preexisting material or data of any kind. There is necessarily some overlapping between the two, but they basically represent different concepts. A "compilation" results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in that material have been or ever could have been subject to copyright. A "derivative work," on the other hand, requires a process of recasting, transforming, or adapting "one or more preexisting works"; the "preexisting work" must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted.

The second part of the sentence that makes up section 103(a) deals with the status of a compilation or derivative work unlawfully employing preexisting copyrighted material. In providing that protection does not extend to "any part of the work in which such material has been used unlawfully," the bill prevents an infringer from benefiting, through copyright protection, from his unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized. Under this provision, copyright could be obtained as long as the use of the preexisting work was not "unlawful," even though the consent of the copyright owner had not been obtained. For instance, the unauthorized reproduction of a work might be "lawful" under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted.

SECTION 104. NATIONAL ORIGIN

Section 104 of the bill, which sets forth the basic criteria under which works of foreign origin can be protected under the U.S. copyright law, divides all works coming within the scope of sections 102 and 103 into two categories: unpublished and published. Subsection (a) imposes no qualifications of nationality and domicile with respect to unpublished works. Subscetion (b) would make published works subject to protection under any one of four conditions:

(1) The author is a national or domiciliary of the United States or of a country with which the United States has copyright relations under a treaty;

(2) The work is first published in the United States or in a country that is a party to the Universal Copyright Convention;

(3) The work is first published by the United Nations, by any of its specialized agencies, or by the Organization of American States; or

(4) The work is covered by a Presidential proclamation extending protection to works originating in a specified country which extends protection to U.S. works "on substantially the same basis" as to its own works.

Subsection (c) provides that the expropriation by a governmental organization of a foreign country, of a copyright, or the right to secure a copyright or any right in a work for which a copyright may be secured, or the transfer of a copyright from the author or copyright owner to a governmental agency of a foreign country pursuant to any law requiring such transfer shall not be given effect for the purposes of this title.

The purpose of this subsection is to implement the basic principle that an authors United States copyright in his work shall be secured to him, and cannot be taken from him by any foreign government. It is the intent of the subsection that the author or copyright owner is entitled, despite the expropriation or transfer, to continue exercising all rights under the United States statute, and that the foreign governmental organization may not enforce or exercise any rights under this Act. For purposes of this subsection, if a foreign government conditions the right to secure copyright on the elimination by the author of portions of his work such action may be construed as an act of expropriation.

A "governmental organization" includes departments, agencies and other official or quasi-official organs of the government, or any corporation or organization designated by the government to serve such a function.

It may sometimes be difficult to ascertain if a transfer of copyright is voluntary or is coerced by covert pressure. But subsection (c) would protect foregin authors against laws and decrees which would divest them of their rights under the United States Copyright Act. It would protect authors within the foreign country who choose to resist such covert pressures.

SECTION 105. U.S. GOVERNMENT WORKS

The basic premise of section 105 of the bill is the same as that of section 8 of the present law—that works produced for the U.S. Government by its officers and employees should not be subject to copyright. The provision applies the principle equally to unpublished and published works.

A Government official or employee should not be prevented from securing copyright in a work written at his own volition and outside his duties, even though the subject matter involves his Government work or his professional field. A more difficult and far-reaching problem is whether the definition should be broadened to prohibit copyright in works prepared under U.S. Government contract or grants. As the bill is written, the Government agency concerned could determine in each case whether to allow an independent contractor or grantee to secure copyright in works prepared in whole or in part with the use of Government funds. The argument against allowing copyright in this situation is that the public should not be required to pay a "double subsidy," and that it is inconsistent to prohibit copyright in works by Government employees while permitting private copyrights in a growing body of works created by persons who are paid with Government funds.

The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

Section 8 of the statute now in effect includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. There is no need to restate this principle explicitly in the context of section 105; there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work, and publication or other use by the Government of a private work could not affect its copyright protection in any way.

While the intent of section 105 is to restrict the prohibition against Government copyright to works written by employees of the United States Government within the scope of their official duties. In accordance with the objectives of the Postal Reorganization Act of 1970, this section does not apply to works created by employees of the United States Postal Service. The privilege of securing copyright in its publications does not extend to restrictions on the use of postage-stamps on mail carried by the Postal Service.

SECTION 106. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS

General scope of copyright

The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called "bundle of rights" that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 11 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 117," and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he engages in the business of renting it to others for purposes of unauthorized public performance.

Rights of reproduction, adaptation, and publication

The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. § 1).

Reproduction.—Read together with the relevant definitions in section 101, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted works would still be an infringement as long as the author's "expression" rather than merely his "ideas" are taken.

"Reproduction" under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of caluse (1), although it might come within the scope of clause (5).

Preparation of derivative works.—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

Use in information storage and retrieval systems—As section 117 declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems.

Public distribution.—Clause (3) of section 106 establishes the exclusive right of publication: The right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement. As section 109 makes clear, however, the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

Rights of public performance and display

Performing rights and the "for profit" limitation.—The right of public performance under section 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "nonprofit' organizations are highly subsidized and capable of paying royalties and the widespread public exploitation of copyrighted works by educational broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

The exclusive right of public performance is expanded to include not only motion pictures but also audiovisual works such as filmstrips and sets of slides. This provision of section 106(4), which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114.

Right of public display.—Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works", including the individual images of a motion picture or other audiovisual work, the exclusive right "to display the copyrighted work publicly."

Definitions

Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he sings a song; a broadcasting network is performing when it transmits his performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 117.

To "perform" a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

The definition of "perform" in relation to "a motion picture or other audio visual work" is "to show its images in any sequence or to make the sounds accompanying it audible." The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a "performance" rather than a "display", but no particular order need be maintained. The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of "display," covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual images nonsequentially." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of "publicly", a performance or display is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp.* v. *Wyatt*, 21 C.O. Bull. 203 (D. Md. 1932), performances in "semipublic" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of business and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106.

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no direct proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

SECTION 107. FAIR USE

General background of the problem

The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no sense definitive or determinative, provide some gage for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which were stated in the 1964 bill and have been adopted in section 107: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

The underlying intention of the bill with respect to the application of the fair use doctrine in various situations is discussed below. It should be emphasized again that, in those situations or any others, there is no purpose of either freezing or changing the doctrine. In particular, the reference to fair use "by reproduction in copies or phonorecords or by any other means" should not be interpreted as sanctioning any reproduction beyond the normal and reasonable limits of fair use. In making separate mention of "reproduction in copies or phonorecords" in the section, the provision is not intended to give this kind of use any special or preferred status as compared with other kinds of uses. In any event, whether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence.

Intention behind the provision

In general.—The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, as outlined earlier in this report, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. However, since this section will represent the first statutory recognition of the doctrine in our copyright law, some explanation of the considerations behind the language used in the list of four criteria is advisable. This is particularly true as to cases of copying by teachers, and by public libraries, since in these areas there are few if any judicial guidelines.

The statements in this report with respect to each of the criteria of fair use are necessarily subject to qualifications, because they must be applied in combination with the circumstances pertaining to other criteria, and because new conditions arising in the future may alter the balance of equities. It is also important to emphasize that the singling out of some instances to discuss in the context of fair use is not intended to indicate that other activities would or would not be beyond fair use.

The purpose and nature of the use

Copyright recognized.—Section 107 makes it clear that, assuming the applicable criteria are met, fair use can extend to the reproduction of copyrighted material for purposes of classroom teaching.

Nonprofit element.—Although it is possible to imagine situations in which use by a teacher in an educational organization operated for profit (day camps, language schools, business schools, dance studios, et cetera) would constitute a fair use, the nonprofit character of the school in which the teacher works should be one factor to consider in determining fair use. Another factor would be whether any charge is made for the copies distributed.

Spontaneity.—The fair use doctrine in the case of classroom copying would apply primarily to the situation of a teacher who, acting individually and at his own volition, makes one or more copies for temporary use by himself or his pupils in the classroom. A different result is indicated where the copying was done by the educational institution, school system, or larger unit or where copying was required or suggested by the school administration, either in special instances or as part of a general plan.

Single and multiple copying.—Depending upon the nature of the work and other criteria, the fair use doctrine should differentiate between the amount of a work that can be reproduced by a teacher for his own classroom use (for example, for reading or projecting a copy or for playing a tape recording), and the amount that can be reproduced for distribution to pupils. In the case of multiple copies, other factors would be whether the number reproduced was limited to the size of the class, whether circulation beyond the classroom was permitted, and whether the copies were recalled or destroyed after temporary use.

Collections and anthologies.—Spontaneous copying of an isolated extract by a teacher, which may be a fair use under appropriate circumstances, could turn into an infringement if the copies were accumulated over a period of time with other parts of the same work, or were collected with other material from various works so as to constitute an anthology.

Special uses.—There are certain classroom uses which, because of their special nature, would not be considered an infringement in the ordinary case. For example, copying of extracts by pupils as exercises in a shorthand or typing class or for foreign language study, or recordings of performances by music students for purposes of analysis and criticism, would normally be regarded as a fair use unless the copies of phonorecords were retained or duplicated.

The nature of the copyrighted work

Character of the work.—The character and purpose of the work will have a lot to do with whether its reproduction for classroom purposes is fair use or infringement. For example, in determining whether a teacher could make one or more copies without permission, a news article from the daily press would be judged differently from a full orchestral score of a musical composition. In general terms it could be expected that the doctrine of fair use would be applied strictly to the classroom reproduction of entire works, such as musical compositions, dramas, and audiovisual works including motion pictures, which by their nature are intended for performance or public exhibition.

Similarly, where the copyrighted work is intended to be "consumable" in the course of classroom activities—workbooks, exercises, standardized tests, and answer sheets are examples—the privilege of fair use by teachers or pupils would have little if any application. Text books and other material prepared primarily for the school markets would be less susceptible to reproduction for classroom use than material prepared for general public distribution. With respect to material in newspapers and periodicals the doctrine of fair use should be liberally applied to allow copying of items of current interest to supplement and update the students' textbooks, but this would not extend to copying from periodicals published primarily for student use.

Availability of the work.—A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is "out of print" and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case, but the existence of organizations licensed to provide photocopies of out-of-print works at reasonable cost is a factor to be considered. The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances the copyright owner's "right of first publication" would outweigh any needs of reproduction for classroom purposes.

The amount and substantiality of the material used

During the consideration of this legislation there has been considerable discussion of the difference between an "entire work" and an "excerpt". The educators have sought a limited right for a teacher to make a single copy of an "entire" work for classroom purposes, but it seems apparent that this was not generally intended to extend beyond a "separately cognizable" or "self-contained" portion (for example, a single poem, story, or article) in a collective work, and that no privilege is sought to reproduce an entire collective work (for example, an encyclopedia volume, a periodical issue) or a sizable integrated work published as an entity (a novel, treatise, monograph, and so forth). With this limitation, and subject to the other relevant criteria, the requested privilege of making a single copy appears appropriately to be within the scope of fair use.

The educators also sought statutory authority for the privilege of making "a reasonable number of copies or phonorecords for excerpts or quotations * * *, provided such excerpts or quotations are not substantial in length in proportion to their source." In general, and assuming the other necessary factors are present, the copying for classroom purposes of extracts or portions, which are not self-contained and which are relatively "not substantial in length" when compared to the larger, self-contained work from which they are taken, should be considered fair use. Depending on the circumstances, the same would also be true of very short self-contained works such as a brief poem, a map in a newspaper, a "vocabulary builder" from a monthly magazine, and so forth. This should not be construed as permitting a teacher to make multiple copies of the same work on a repetitive basis or for continued use.

Effect of use on potential market for or value of work

This factor must almost always be judged in conjunction with the other three criteria. With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement. As in any other case, whether this would be the result of reproduction by a teacher for classroom purposes requires an evaluation of the nature and purpose of the use, the type of work involved, and the size and relative importance of the portion taken. Fair use is essentially supplementary by nature, and classroom copying that exceeds the legitimate teaching aims such as filling in missing information or bringing a subject up to date would go beyond the proper bounds of fair use. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.

Reproductions and uses for other purposes

The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

The fair use doctrine would be relevant to the use of excerpts from copyrighted works in educational broadcasting activities not exempted under sections 110(2) or 112. In these cases the factors to be weighed in applying the criteria of this section would include whether the performers, producers, directors, and others responsible for the broadcast were paid, the size and nature of the audience, the size and number of exerpts taken and, in the case of recordings made for broadcast, the number of copies reproduced and the extent of their reuse or exchange. The availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works, but under appropriate circumstances it could apply to the nonsequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment.

The committee's attention has been directed to the special problems involved in the reception of instructional television programs in remote areas of the country. In certain areas it is currently impossible to transmit such programs by any means other than communications satellites. A particular difficulty exists when such transmissions extend over several time zones within the same state, such as in Alaska. Unless individual schools in such states may make an off-air recording of such transmissions, the programs may not be received by the students during the school's daily schedule. The committee believes that the making by a school located in such a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for the same school constitutes a "fair use". The committee does not intend to suggest however, that off-the-air recording for convenicnec would under any circumstances, be considered "fair use". To meet the requirement of temporary use the school may retain the recording for only a limited period of time after the broadcast.

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in braille and phonorecords of oral readings (talking books), are not usually made by the publishers for commercial distribution. For the most part, such copies and phonorecords are made by the Library of Congress' Division for the Blind and Physically Handicapped with permission obtained from the copyright owners, and are circulated to blind persons through regional libraries covering the nation. In addition, such copies and phonorecords are made locally by individual volunteers for the use of blind persons in their communities, and the Library of Congress conducts a program for training such volunteers. While the making of multiple copies or phonorecords of a work for general circulation requires the permission of the copyright owner, the making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under section 107.

A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. Aside from the deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed, those that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of "fair use."

When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual or institution, such individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment on the statements made in the work.

SECTION 108. REPRODUCTION BY LIBRARIES AND ARCHIVES

Notwithstanding the exclusive rights of the owners of copyright, section 108 provides that under certain conditions it is not an infringement of copyright for a library or archives, or any of their employees acting within the scope of their employment, to reproduce or distribute not more than one copy or phonorecord of a work provided (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage and (2) the collections of the library or archives are open to the public or available not only to researchers affiliated with the library or archives, but also to other persons doing research in a specialized field, and (3) the reproduction or distribution of the work includes a notice of copyright.

The rights of reproduction and distribution under section 108 apply in the following circumstances:

Archival reproduction

Subsection (b) authorizes the reproduction and distribution of a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security, or for deposit for research use in another library or archives, if the copy or phonorecord reproduced is currently in the collections of the first library or archives. Only unpublished works could be reproduced under this exemption, but the right would extend to any type of work, including photographs, motion pictures and sound recordings. Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in "machine-readable" language for storage in an information system.

Replacement of damaged copy

Subsection (c) authorizes the reproduction of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price. The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

Articles and small excerpts

Subsection (d) authorizes the reproduction and distribution of a copy of not more than one article or other contribution to a copyrighted collection of a periodical or copy or phonorecord of a small part of any other copyrighted work. The copy may be made by the library where the user makes his request or by another library pursuant to an inter-library loan. It is further required that the copy become the property of the user, that the library or archives have no notice that

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the copy would be used for any purposes other than private study, scholarship or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and includes in its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

Out-of-print works

Subsection (e) authorizes the reproduction and distribution of a copy of a work, with certain exceptions, at the request of the user of the collection if the user has established that an unusued copy cannot be obtained at a fair price. The copy may be made by the library where the user makes his request or by another library pursuant to an inter-library loan. The scope and nature of a reasonable investigation to determine that an unused copy cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purpose other than private study, scholarship, or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and include on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

General Exemptions

Clause (1) of subsection (f) specifically exempts a library or archives or their employees from such liability provided that the reproducing equipment displays a notice that the making of a copy may be subject to the copyright law. Clause (2) of subsection (f) makes clear that this exemption of the library or archives does not extend to the person using such equipment or requesting such copy if the use exceeds fair use. Insofar as such person is concerned the copy made is not considered "lawfully" made for purposes of sections 109, 110 or other provisions of the title. Clause (3) in addition to asserting that nothing contained in section 108 "affects the right of fair use as provided by section 107", also provides that the right of reproduction granted by this section does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections. For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.

It is the intent of this legislation that a subsequent unlawful use by a user of a copy of a work lawfully made by a library, shall not make the library liable for such improper use.

Multiple Copies and Systematic Reproduction

Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy", but this section does not authorize the related or concerted reproduction of multiple copies of the same material whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. For example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for the members of the class.

Subsection (g) also provides that section 108 does not authorize the systematic reproduction or distribution of copies or phonorecords of articles or other contributions to copyrighted collections or periodicals or of small parts of other copyrighted works whether or not multiple copies are reproduced or distributed. Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies.

While it is not possible to formulate specific definitions of "systematic copying", the following examples serve to illustrate some of the copying prohibited by subsection (g).

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and that the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.

The committee believes that section 108 provides an appropriate statutory balancing of the rights of creators, and the needs of users. However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction". Isolated single spontaneous requests must be distinguished from "systematic reproduction". The photocopying needs of such operations as multicounty regional systems, must be met. The committee therefore recommends that representatives of authors, book, and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.

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In adopting these provisions on library photocopying, the committee is aware that through such programs as those of the National Commission on Libraries and Information Science there will be a significant evolution in the functioning and services of libraries. To consider the possible need for changes in copyright law and procedures as a result of new technology, title II of this legislation establishes a National Commission on New Techonlogical Uses of Copyrighted Works. It is the desire of the committee that the Commission give priority to those aspects of the library-copyright interface which require further study and clarification.

Works excluded

Subsection (h) provides that the rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work. Such limitation does not apply to archival reproduction and replacement of a damaged copy.

SECTION 109. EFFECT OF TRANSFER OF PARTICULAR COPY OR PHONORECORD

Effect on further disposition of copy or phonorecord

Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of his work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it.

Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright. Under section 202, however, the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent.

To come within the scope of section 109(a), a copy or phonorecord must have been "lawfully made under this title," though not necessarily with the copyright owner's authorization. For example, any resale of an illegally "counterfeited" phonorecord would be an infringement, but the disposition of a phonorecord made under the compulsory licensing provisions of section 115 would not.

Effect on display of copy

Subsection (b) of section 109 deals with the scope of the copyright owner's exclusive right to control the public display of a particular "copy" of his work (including the original or prototype copy in which the work was first fixed). Assuming, for example, that a painter has sold his only copy of an original work of art without restrictions, would he be able to restrain the new owner from displaying it publicly in galleries, shop windows, on a projector, or on television?

Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner. The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the viewers are "present at the place where the copy is located."

The exemption would extend only to public displays that are made "either directly or by the projection of no more than one image at a time." Thus, even where the copy and the viewers are located at the same place, the simultaneous projection of multiple images of the work would not be exempted. For example, where each person in a lecture hall has his own viewing apparatus in front of him, the copyright owner's permission would generally be required in order to project an image of a work on each individual screen at the same time.

The committee's intention is to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on his ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected. Unless it constitutes a fair use under section 107, or unless one of the special provisions of sections 110 or 111 is applicable, projection of more than one image at a time, or transmission of an image to the public over television or other communications channels, would be an infringement for the same reasons that reproduction in copies would be.

Effect of mere possession of copy or phonorecord

Subsection (c) of section 109 qualifies the privileges specified in subsections (a) and (b) by making clear that they do not apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it. Acquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no privileges to dispose of the copy under section 109(a) or to display it publicly under section 109(b). To cite a familiar example, a person who has rented a print of a motion picture from the copyright owner would have no right to rent it to someone else without the owner's permission.

SECTION 110. EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS

Clauses (1) through (4) deal with performances and exhibitions that are now generally exempt under the "for profit" limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation. Clauses (1) and (2) between them are intended to cover all of the various methods by which systematic instruction takes place.

Face-to-face teaching activities

Clause (1) of section 110 is generally intended to set out the conditions under which performances or displays, in the course of instructional activities other than educational broadcasting, are to be exempted from copyright control. The clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction."

There appears to be no need for a statutory definition of "face-to-face" teaching activities to clarify the scope of the provision. "Face-to-face teaching activities" under clause (1) embraces instructional performances and displays that are not "transmitted." It does not require that the teacher and his student be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into a classroom, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images. The "teaching activities" exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

Works affected.—Since there is no limitation on the types of works covered by the exemption, a teacher or student would be free to perform or display anything in class as long as the other conditions of the clause are met. He could read aloud from copyrighted text material, act out a drama, play or sing a musical work, perform a motion picture or filmstrip, or display text or pictorial material to the class by means of a projector. However, nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display, and the amended clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

Instructors or pupils.—To come within clause (1), the performance or display must be "by instructors or pupils," thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program. However, the term "instructors" would be broad enough to include guest lecturers if their instructional activities remain confined to a classroom situation. In general, the term "pupils" refers to the enrolled members of a class.

Nonprofit educational institution.—Clause (1) makes clear that it applies only to the teaching activities "of a nonprofit educational institution," thus excluding from the exemption performances or displays in profit-making institutions such as dance studios and language schools.

Classroom or similar place.—The teaching activities exempted by the clause must take place "in a classroom or similar place devoted to instruction." For example, performances in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of clause (1), although in some cases they might be exempted by clause (4) of section 110. The "similar place" referred to in clause (1) is a place which is "devoted to instruction" in the same way a classroom is; common examples would include a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself if it is actually used as a classroom for systematic instructional activities.

Motion pictures and other audiovisual works.—The final provision of clause (1) deals with the special problem of performances from unlawfully made copies of motion pictures and other audiovisual works. The exemption is lost where the copy being used for a classroom performance was "not lawfully made under this title" and the person responsible for the performance knew or had reason to suspect as much. This special exception to the exemption would not apply to performances from lawfully made copies, even if the copies were acquired from someone who had stolen or converted them, or if the performances were in violation of an agreement. However, though the performances would be exempt under section 110(1) in such cases, the copyright owner might have a cause of action against the unauthorized distributor under section 106(3), or against the person responsible for the performance for breach of contract.

Projection devices.—As long as there is no transmission beyond the place where the copy is located, both section 109(b) and section 110(1) would permit the classroom display of a work by means of any sort of projection device or process.

Instructional broadcasting

Works affected.—The exemption would apply only to "performance of a nondramatic literary or musical work or of a sound recording, or display of a work." Thus, the copyright owner's permission would be required for the performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion picture. Since, as already explained, audiovisual works such as filmstrips are now equated with motion pictures, their sequential showing would be regarded as a performance rather than a display and would not be exempt under section 110(2). The clause is not intended to limit in any way the copyright owner's exclusive right to make dramatizations, adaptations, or other derivative works under section 106(2). Thus, for example, a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form.

Systematic instructional activities.—Under section 110(2) a transmission must meet three specified conditions in order to be exempted from copyright liability. The first of these, as provided by subclause (A), is that the performance or display must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The concept of "systematic instructional activities" is intended as the general equivalent of "curriculums," but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work. A transmission would be a regular part of these activities if it is in accordance with the pattern of teaching established by the governmental body or institution. The use of commercial facilities, such as those of a cable service, to transmit the performance or display, would not affect the exemption as long as the actual performance or display was for nonprofit purposes.

Content of transmissions.—Subclause (B) requires that the performance or display is directly related and of material assistance to the teaching content of the transmission.

Intended recipients.—Subclause (C) requires that the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instructions, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment.

In all three cases, the instructional transmission need only be made "primarily" rather than "solely" to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would not be regarded as made "primarily" for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the "primary" purpose of a program would include its subject matter, content, and the time of its transmission.

Paragraph (i) of subclause (C) generally covers what are known as "in-school" broadcasts, whether open- or closed-circuit. The reference to "classrooms or similar places" here is intended to have the same meaning as that of the phrase as used in section 110(1). The exemption in paragraph (ii) is intended to exempt transmissions providing systematic instruction to individuals who cannot be reached in classrooms because of "their disabilities or other special circumstances." Accordingly, the exemption is confined to instructional broadcasting that is an adjunct to the actual classwork of nonprofit schools or is primarily for people who cannot be brought together in classrooms such as preschool children, displaced workers, illiterates, and shut-ins.

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes due to daytime employment, distance from campus or for some other intervening reason. So long as these broadcasts are aimed at regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110(2)(C)(ii). Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum.

The third exemption in subclause (C) is intended to permit the use of copyrighted material, in accordance with the other conditions of section 110(2), in the course of instructional transmissions to Government personnel who are receiving training "as a part of their official duties or employment."

Public broadcasting

While the bill grants an exemption to instructional transmissions meeting the criteria of section 110(2), the amendment to provide a compulsory license at regulated rates for the use of copyrighted material in the programs of public television which are intended for reception by a general audience, was not accepted. The programing of public television includes an increasing emphasis on programs of an entertainment or general cultural nature. The committee is not unaware of the financial strains of many public broadcasting stations. Such stations may deserve greater financial assistance, but they should not be subsidized by this country's creative talent.

Copyright proprietors should promptly undertake efforts to improve procedures whereby public television may secure copyright clearances. The committee understands that the Register of Copyrights is prepared to furnish the assistance of the Copyright Office in studying clearance procedures and making recommendations aimed at the establishment of voluntary clearinghouse arrangements.

Religious services

The scope of clause (3) does not cover the sequential showing of motion pictures and other audiovisual works. The exemption, which to some extent has its counterpart in sections 1 and 104 of the present law applies to dramatico-musical works "of a religious nature." The purpose here is to exempt certain performances of sacred music that might be regarded as "dramatic" in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme and take place "in the course of [religious] services."

To be exempted under section 110(3) a performance or display must be "in the course of services," thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes. Some performances of these kinds could be covered by the exemption in section 110(4), discussed next. Since the performance or display must also occur "at a place of worship or other religious assembly," the exemption would not extend to religious broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship. On the other hand, as long as services are being conducted before a religious gathering, the exemption would apply if they were conducted in places such as auditoriums, outdoor theaters, and the like.

Certain other nonprofit performances

In addition to the educational and religious exemptions provided by clauses (1) through (3) of section 110, clause (4) contains a general exception to the exclusive right of public performance that would cover some, though not all, of the same ground as the present "for profit" limitations.

Scope of exemption.—The exemption in clause (4) applies to the same general activities and subject matter as those covered by the "for profit" limitation today: public performances of nondramatic literary and musical works. However, the exemption would be limited to public performances given directly in the presence of an audience whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus, and would not include a "transmission to the public." Unlike the other clauses of section 110, clause (4) applies only to performing rights in certain works and does not affect the exclusive right to display a work in public.

No profit motive.—In addition to the other conditions specified by the clause, the performance must be "without any purpose of direct or indirect commercial advantage." This provision expressly adopts the principle established by the court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

No payment for performance.—An important condition for this exemption is that the performance be given "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters, producers, and the like. However, the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly "for the performance," are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met, and has not adopted the suggestion that the word "salary" be added to the phrase referring to the "payment of any fee or other compensation."

Admission charge.—Assuming that the performance involves no profit motive and no one responsible for it gets paid a fee, it must still meet one or two alternative conditions to be exempt. As specified in subclauses (A) and (B) of section 110(4), these conditions are: (1) that no direct or indirect admission charge is made, or (2) that the net proceeds are "used exclusively for educational, religious, or charitable purposes and not for private financial gain."

Under the second of these conditions, a performance meeting the other conditions of clause (4) would be exempt even if an admission fee is charged, provided any amounts left "after deducting the reasonable costs of producing the performance" are used solely for bona fide educational, religious, or charitable purposes.

The provision also provides that if there is an admission charge the copyright owner may prevent a public performance of his work under this provision by serving a notice stating his objections at least seven days in advance.

Mere reception in public

Unlike the first four clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The main effect of this exemption would be to allow the use of ordinary radios and television sets for the incidental entertainment of patrons in small business or professional establishments such as taverns, lunch counters, hairdressers, dry cleaners, doctors' offices, and the like. The clause has nothing to do with cable television systems, and there is no intention to exempt performances in large commercial establishments, such as bus terminals, supermarkets, factories, or department stores, where broadcasts are transmitted to substantial audiences by means of loudspeakers covering a wide area. The exemption would also be denied in any case where the audience is charged directly to see or hear the transmission.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute.

Agricultural fairs

Clause (6) provides that the performance of a nondramatic musical work or of a sound recording in the course of an annual agricultural or horticultural fair or exhibition conducted by a Governmental body or a nonprofit organization is not an infringement of copyright. This exemption extends to all activities on the premises of such fairs or exhibitions.

Retail sale of phonorecords

Clause (7) provides that the performance of a nondramatic musical work or of a sound recording by a retail establishment open to the public at large without any direct or indirect admission charge where the sole purpose of the performance is to promote the retail sale of the work is not an infringement of copyright. This exemption applies only if the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

SECTION 111. SECONDARY TRANSMISSIONS

General exemptions

Certain secondary transmissions are given a general exemption under clause (1) of section 111(a). The first of these applies to secondary transmissions consisting "entirely of the relaying, by the management of a hotel, apartment house, or similar establishment" of a transmission to the private lodgings of guests or residents and provided "no direct charge is made to see or hear the secondary transmission."

The exemption would not apply if the secondary transmission consists of anything other than the mere relay of public broadcasts; the cutting out of advertising or the running in of new commercials would subject the secondary transmitter to full liability. Moreover, the term "private lodgings" is limited to rooms used as living quarters or for private parties, and does not include dining rooms, meeting halls, theaters, ballrooms, or similar places that are outside of a normal circle of a family and its social acquaintances. No special exception is needed to make clear that the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement.

Secondary transmissions of instructional broadcasts.—Subclause (2) of section 111(a) is intended to make clear that an instructional transmission within the scope of section 110(2) is exempt whether it is a "primary transmission" or a "secondary transmission."

Common carriers.—The general exemption under section 111 extends to secondary transmitters that act solely as passive common carriers. Under subclause (3), a common carrier is exempt if it "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission" For this purpose its activities must "consist solely of providing wires, cables, or other communications channels for the use of others." Since cable television necessarily selects the primary transmissions which are transmitted, and controls the recipients of the secondary transmission, the exemption of this subclause would in no case apply to them.

Clause (4) would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.

Secondary transmissions of primary transmissions to controlled group.—Subsection (b) provides that the secondary transmission to the public of a primary transmission embodying a performance for display is actionable as an act of infringement if the primary transmissions is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. Examples of transmissions not intended for the general public are background music services such as Muzak, closed circuit broadcasts to theaters, and pay television.

Secondary transmission by cable systems.—Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. Certain CATV systems also originate live programs. A large number of systems provide automated programing. A typical system consists of a central antenna which receives and amplifies television signals, and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an initial installation charge, the subscribers pay a monthly service charge averaging about five or six dollars. The number of CATV systems in the United States has grown very rapidly since their introduction in 1950 and now total about 3000 operating systems, serving 5700 communities. Systems currently in operation reach about 7.3 million homes, about 22.5 million people. The average cable system is estimated to have 2240 subscribers. It is reported that the 1973 total subscriber revenues of the cable industry were approximately $475 million.

Compulsory licensing

Section 111(c)(1) provides that, subject to certain other provisions of the legislation, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a copyrighted work is subject to compulsory licensing if (1) the signals comprising the primary transmission are exclusively aural; (2) if the signals are local signals of the primary transmitter or; (3) where the carriage of the signals is permissable under the rules, regulations or authorizations of the Federal Communications Commission.

Secondary transmissions fully liable

Section 111(c)(2) enumerates the circumstances in which a secondary transmission by a cable system is fully subject to the remedies provided in this legislation for infringement of copyright. Subclause (A) provides that a cable system is fully liable where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations or authorizations of the Federal Communications Commission. Subclause (B) provides that a cable system is fully liable if it has not at least one month before the date of the secondary transmission recorded the notice specified by subsection (d) of this section.

The committee has considered excluding from the scope of the compulsory license granted to cable systems the carriage in certain circumstances of organized professional sporting events. The committee has also considered the inclusion in this legislation of language extending to cable television the same restrictions as are contained in Public Law 87-331 for the protection of intercollegiate and scholastic sports from the competition of televised professional games. Without prejudice to the arguments advanced in behalf of these proposals, the committee has concluded that these issues should be left to the rulemaking process of the Federal Communications Commission, or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce. In reaching this determination, the committee notes that the Federal Communications Commission has a pending rulemaking proceeding on this subject.

Requirements for a compulsory license

Subsection (d)(1) provides that for any secondary transmission to receive a compulsory license the cable system must at least one month before the date of the secondary transmission, record in the Copyright Office a notice, including a statement of the identity and address of the person who owns the secondary transmission service or has power to exercise control over it, together with the name and location of the primary transmitter. Clause (2) provides that a cable system whose secondary transmissions have been subject to compulsory licensing shall file quarterly statements with the Register of Copyrights. These statements shall specify the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers and the gross amounts paid to the cable system by subscribers for the basic service of providing secondary transmissions. This statement must be accompanied by a total royalty fee computed according to the provisions of this legislation.

Copyright royalty payments

Because the cable television industry has not been paying copyright royalties for its secondary transmissions, very little relevant economic data was available to the Subcommittee on Patents, Trademarks and

Copyrights when it established the schedule of royalty payments in S. 543. The Subcommittee in 1973 held a hearing on the royalty schedule previously approved by the Subcommittee and contained in S. 1361. At this hearing the program producers, broadcasters and music performing rights societies expressed opposition to the inclusion of a royalty schedule in the statute. The cable television industry supported the Congress initially determining the royalty payments to be made by cable television systems but expressed concern that the rates in the bill might be too high and thus handicap the development of the cable television industry. The committee believes that the economic data available at the present time is inconclusive but supports the Congress initially establishing royalty rates, as is also provided under Sections 114, 115 and 116.

Every cable system should make some copyright payment. The committee has considered proposals that would exempt from any copyright payment small CATV systems having not more than several thousand subscribers or CATV systems engaged exclusively in the retransmission of local signals. Although the committee recognizes that in certain situations such exemptions might be justified, the most logical and concise approach is to require payment by all systems. The committee recognizes, however, the special concerns of small systems and therefore has adopted a graduated fee schedule. The scale is:

(i) ½ percent of any gross receipts up to $40,000;

(ii) 1 percent of any gross receipts totalling more than $40,000 but not more than $80,000;

(iii) 1½ percent of any gross receipts totalling more than $80,000, but not more than $120,000;

(iv) 2 percent of any gross receipts totalling more than $120,000, but not more than $160,000; and

(v) 2½ percent of any gross receipts totalling more than $160,000.

The total royalty fee shall be determined on the basis of a cable system's gross receipts from its subscribers for the basic service of providing secondary transmissions. Income received from the installation of equipment or from advertising accompanying CATV-originated program is excluded from the computation of the gross receipts of a cable system.

COPYRIGHT PAYMENTS BY SIZE OF CATV SYSTEMS

System size (Number of subscribers)	Quarterly	
	Revenues [1]	Copyright payment
500	$7,500	$37.50
1,000	15,000	75.00
1,500	22,500	112.50
2,000	30,000	150.00
2,500	37,500	187.50
3,000	45,000	250.00
3,500	52,500	325.00
4,500	67,500	475.00
6,000	90,000	750.00
8,000	120,000	1,200.00

[1] Revenues at $5 monthly service charge.

Section 111(d)(3) sets forth the procedures for the distribution of the royalty fees paid by cable systems. Each person claiming such fees must in July of each year file a claim with the Register of Copyrights. Not withstanding any provisions of the antitrust laws the claimants may agree among themselves as to the division and distribution of such fees. If no controversy exists as to the division of the fees the Register of Copyrights, after deducting his reasonable administrative costs, shall distribute the fees to the copyright owners or their agents. If the Register of Copyrights finds the existence of a controversy, he shall proceed as is provided in Chapter 8 to constitute a panel of the Copyright Royalty Tribunal. The Register of Copyrights shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

Definitions

Subsection (e) contains a series of definitions. These definitions are found in subsection (e) rather than in Section 101 because of their particular application to secondary transmissions by cable systems.

The definitions of "secondary transmissions" and "cable systems" were drafted in part to reflect the special communications problems of the non-contiguous states, territories and possessions. While the systems operating in these areas may not meet the customary definitions of a cable system, it is the intent of this legislation that such systems, for purposes of this legislation, shall be regarded as conventional cable systems despite the necessary differences in technology and operating procedures. The application of the provisions of this section to transmissions by "cable systems" not within the boundary of the forty-eight states is fully subject to the rules and regulations of the Federal Communications Commission.

However, the treatment accorded such cable systems is not meant to relieve them of the same obligations and limitations as are imposed by the Federal Communications Commission on cable systems operating in comparable market situations in the contiguous states. For example, cable systems in the contiguous states are subject to certain rules and regulations regarding carriage of signals and program exclusivity protection when they transmit television broadcast signals. It is the intent of the committee that cable systems in the non-contiguous states, territories and possessions should be subject to the same rules and regulations.

With respect to cable systems in Alaska, the intent of this section that their secondary transmissions to the fullest possible extent consist of signals received from primary transmissions by Alaska stations.

SECTION 112. EPHEMERAL RECORDINGS

Section 112 of the bill concerns itself with a special problem that is not dealt with in the present statute but is the subject of provisions in a number of foreign statutes and in the 1948 Brussels revision of the Berne Convention. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.

Recordings for licensed transmissions

Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a second recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization's own transmissions within its own area; after 6 months it must be destroyed or preserved solely for archival purposes.

Organizations covered.—The ephemeral recording privilege is given by subsection (a) to "a transmitting organization entitled to transmit to the public a performance or display of a work." Assuming that the transmission meets the other conditions of the provisions, it makes no difference what type of public transmission the organization is making: commercial radio and television broadcasts, public television broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth. However, to come within the scope of subsection (a), the organization must have the right to make the transmission "under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a)." Thus, the organization must be a transferee or licensee (including compulsory licensee) of performing rights in the work in order to make an ephemeral recording of it.

Some concern has been expressed by authors and publishers lest the term "organization" be construed to include a number of affiliated broadcasters who could exchange the recording without restrictions. The term is intended to cover a broadcasting network, or a local broadcaster or individual transmitter; but, under clauses (1) and (2) of the subsection, the ephemeral recording must be "retained and used solely by the transmitting organization that made it," and must be used solely for that organization's own transmissions within its own area. Thus, an ephemeral recording made by one transmitter, whether it be a network or local broadcaster, could not be made available for use by any other transmitter. Likewise, this subsection does not apply to nonsimultaneous transmissions by cable systems not located within the boundary of the forty-eight contiguous States, which are granted a compulsory license under section 111.

Scope of the privilege.—Subsection (a) permits the transmitting organization to make "no more than one copy or phonorecord of a particular transmission program embodying the performance or display." A "transmission program" is defined in section 101 as a body of material produced for the sole purpose of transmission as a unit. Thus, under section 112(a), a transmitter could make only one copy or phonorecord of a particular "transmission program" containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other "transmission programs."

Three specific limitations on the scope of the ephemeral recording privilege are set out in subsection (a), and unless all are met the making of an "ephemeral recording" becomes fully actionable as an infringement. The first requires that the copy or phonorecord be "retained and used solely by the transmitting organization that made it," and that "no further copies or phonorecords are reproduced from it." This means that a transmitting organization would have no privilege of exchanging ephemeral recordings with other transmitters or allowing them to duplicate their own ephemeral recordings from the copy or phonorecord it has made. There is nothing in the provision to prevent a transmitting organization from having an ephemeral recording made by means of facilities other than its own, although it would not be permissible for someone other than a transmitting organization to make a recording on his own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to copies or phonorecords made in advance for later broadcast, as well as recordings of a program that are made while it is being transmitted and are intended for deferred transmission or preservation.

Clause (2) of section 112(a) provides that, to be exempt from copyright, the copy or phonorecord must be "used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security". The term "local service area" is defined in section 111(e). In the context of section 112 it means that, although a transmitter may use an ephemeral recording as many times as it wishes within the time limits specified in clause (3), its use must be confined to the organization's own transmissions within the radius that its signal "is expected to reach effectively under normal conditions."

Clause 3 of section 112(a) provides that unless preserved exclusively for archival purposes, the copy of a transmission program must be destroyed within six months from the day the transmission program was first transmitted to the public.

Recording for instructional transmissions

Section 112(b) represents a response to the arguments of educational broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a to make not more than thirty copies or phonorecords and to use the ephemeral recordings for transmitting purposes for not more than seven years after the initial transmission.

Organizations covered.—The privilege of making ephemeral recordings under section 112(b) extends to "a governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a)." The ephemeral recordings made by an instructional broadcaster under subsection (b) must embody a performance or display that meets all of the qualifications for exemption under section 110(2). Copies or phonorecords made for educational broadcasts of a general cultural nature, or for transmission as part of an information storage and retrieval system, would not be exempted from copyright protection under section 112(b).

Motion pictures and other audiovisual works.—Since the performance exemption provided by section 110(2) applies only to nondramatic literary and musical works, there was no need to exclude motion pictures and other audiovisual works explicitly from the scope of section 112(b). Another point stressed by the producers of educational films during the hearings of the Senate Subcommittee on Patents, Trademarks and Copyrights, in this connection, however, was that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for exactly the same market. They argued that it is unfair to allow instructional broadcasters to reproduce multiple copies of films and tapes, and to exchange them with other broadcasters, without paying any copyright royalties, thereby directly injuring the market of producers of audiovisual works who now pay substantial fees to authors for the same uses. These arguments are persuasive and justify the placing of reasonable limits on the recording privilege.

Scope of the privilege.—Under subsection (b) an instructional broadcaster may make "no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display." No further copies or phonorecords can be reproduced from those made under section 112(b), either by the nonprofit organization that made them or by anyone else. Unlike ephemeral recordings made under subsection (a), however, exchanges of recordings among instructional broadcasters are permitted. An organization that has made copies or phonorecords under subsection (b) may use one of them for purposes of its own transmissions that are exempted by section 110(2), and it may also transfer the other 29 copies to other instructional broadcasters for use in the same way.

As in the case of ephemeral recordings made under section 112(a), a copy or phonorecord made for instructional broadcasting could be reused in any number of transmissions within the time limits specified in the provision. Because of the special problems of instructional broadcasters resulting from the scheduling of courses and the need to prerecord well in advance of transmission, the period of use has been extended to five years from the date the transmission program was first transmitted to the public.

Religious broadcasts.—Section 112(c) provides that it is not an infringement of copyright for certain organizations to make no more than one copy for each transmitting organization of a broadcast program embodying a performance of a nondramatic musical work of a religious nature or of a sound recording. In order to receive the benefits of this exception there must be no charge for the distribution of the copies, none of the copies may be used for any performance other than a single transmission by an organization possessing a license to transmit a copyrighted work, and, other than for one copy that may be preserved for archival purposes, the remaining copies are destroyed within one year from the date the program was first transmitted to the public. When the conditions of this section are present, the ephemeral recording privileges would also apply to such transmitting organization.

Copyright status of ephemeral recordings

A program reproduced in an ephemeral recording made under either subsection (a) or subsection (b) of section 112 in many cases will constitute a motion picture, a sound recording, or some other kind of derivative work, and will thus be potentially copyrightable under section 103. In section 112(d) it is provided that ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them.

SECTION 113. REPRODUCTION OF PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS IN USEFUL ARTICLES

Section 113 deals with the extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in *Mazer* v. *Stein*, 347 U.S. 201 (1954), and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles. The term "useful article" is defined in section 113(e) as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."

The broad language of section 106(1) and of the first sentence of section 113 raises questions as to the extent of copyright protection for a pictorial, graphic, or sculptural work that protrays, depicts, or represents an image of a useful article in such a way that the utilitarian nature of the article can be seen. To take the example usually cited, would copyright in a drawing or model of an automobile give the artist the exclusive right to make automobiles of the same design?

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that "copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself," and recommended specifically that "the distinctions drawn in this area by existing court decisions" not be altered by the statute. The Register's Supplementary Report, at page 48, cited a number of these decisions, and explained the insuperable difficulty of finding "any statutory formulation that would express the distinction satisfactorily." The committee adopts the Register's conclusion that "the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such."

Clause (2) of section 113(a) provides that it would not be an infringement of copyright, where a copyrighted work has been lawfully published as the design of useful articles, to make, distribute or display pictures of the articles in advertising, in feature stories about the articles, or in the news reports.

Subsections (b), (c), and (d) were inserted in section 113 because of the incorporation in this legislation of title III relating to protection of ornamental designs of useful articles. Subsection (b) provides that when a pictorial, graphic, or sculptural work in which copyright subsists under title I of this bill is utilized in an original ornamental design of a useful article, the design shall be eligible for protection under the provisions of title III of this bill.

Subsection (c) provides that protection of a work in which copyright subsists under title I shall terminate with respect to its utilization in useful articles whenever the copyright proprietor has obtained registration on an ornamental design of a useful article under the provisions of title III. This provision makes explicit that nothing in this section shall be deemed to create any additional rights or protection under title I of this bill.

Subsection (e) is a saving clause to the effect that nothing in this section shall affect any right or remedy held by any person under title I in a work in which copyright was subsisting on the effective date of title III, or with respect to any utilization of a copyrighted work other than in the design of a useful article.

SECTION 114. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS

General considerations

One of the most controversial issues considered by the committee during the examination of this legislation has been the proposal to grant an exclusive right in the public performance of sound recordings embodying a performance.

Some have argued that, without prejudice to the merits of the performance royalty proposal, the question should not be resolved in the current legislation. It was indicated that the issue should be considered either in separate legislation to revise the copyright law, in legislation based upon the concept of "neighboring rights" (that is, legislation similar to but not technically copyright), or by United States ratification of the Rome Convention. The committee believes there is no justification for not resolving this issue on the merits at the present time. All relevant and necessary information is available.

Constitutional basis

One of the objections to the performance royalty has been the contention that the contributions of performing artists and record manufacturers are not "Writings" of an author and therefore are ineligible for Federal copyright protection. The committee does not find the constitutional objection persuasive. Among others, the Copyright Office has advised that the granting of copyright protection to performance rights in sound recordings is within the power conferred on the Congress by the Constitution.

The committee in its examination of this question has reviewed a number of judicial decisions which directly or by implication recognize the existence of the necessary authority in the Congress. In the leading case of *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 656, (2d Cir. 1955), it is stated that "there can be no doubt that, under the Constitution, Congress could give to one who performs a public domain musical composition the exclusive right to make and vend phonograph records of that rendition." In the same case Judge Learned Hand stated "Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution."

Following the enactment of P.L. 92–140, establishing a limited copyright in sound recordings, litigation was instituted in which it was contended that sound recordings did not qualify as writings of an author which may be copyrighted under the Constitution. A special three judge court, convened in the case of *Shaab* v. *Klein-*

dienst, 345 F. Supp. 589 (1972), rejected that argument. The Court said:

> Technical advances, unknown and unanticipated in the time of our founding fathers, are the basis for the sound recording industry. The copyright clause of the Constitution must be interpreted broadly to provide protection for this method of fixing creative works in tangible form . . . .

The committee concludes that records are "writings" and that performers can be regarded as "authors" since their contributions amount to original intellectual creations. The committee, likewise, finds that record manufacturers may be regarded as "authors" since their artistic contribution to the making of a record constitutes original intellectual creation. The committee endorses the conclusion of the Copyright Office that sound recordings "are just as entitled to protection as motion pictures and photographs."

The committee has reviewed the fundamental changes in the relationship between Federal and State law in the field of intellectual property resulting from the 1964 Supreme Court decisions in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234. The committee finds nothing in these decisions or subsequent judicial interpretations to suggest any doubt as to the authority of the Congress to legislate in this area.

Foreign legislation

During the consideration of the copyright revision bill, the Congress had been frequently advised to examine the provisions of the copyright law of other nations. Many of these countries have in the period since World War II enacted general revisions of their copyright law. These countries in adopting new copyright legislation have had to consider issues which obviously were not explored by the Congress in 1909. A number of foreign nations have adopted statutory provisions affording protection to recordings or recorded performances. A compilation of the foreign legislation on this subject is contained in Study No. 26 of the series of studies on Copyright Law Revision prepared for the Subcommittee on Patents, Trademarks and Copyrights.

Domestic legislation in the United Kingdom, the Federal Republic of Germany, Japan, Italy, Spain, Ireland, Czechoslovakia, Finland, Sweden, Denmark and Norway provides for the payment of performance royalties to record producers or performers, or both. In several of these nations only broadcasters are required to pay performance royalties. In addition, in France, Belgium and the Netherlands broadcasting organizations pay royalties to the record producers although the law does not specifically recognize performance rights in records.

Article 12 of the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) states:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between

these parties, lay down the conditions as to the sharing of this remuneration.

Financial data

Another major objection to the creation of a performance royalty in sound recordings has been the contention that it would impose a serious financial burden upon those users who would be required to make payments. Considerable economic data on this question, especially as to the operations and financial condition of radio stations, was submitted to the subcommittee on Patents, Trademarks and Copyrights.

This data indicates that approximately 75% of the commercial time of radio stations is devoted to the playing of recorded music. The committee has reviewed information as to the pre-tax profits of radio stations in representative large, medium, and small markets. This analysis indicates a generally consistent growth in the pre-tax profits of radio stations.

According to the reports filed with the Federal Communications Commission, the radio industry in 1972 had total broadcast revenues of $1,407,000,000 and total broadcast income before taxes of $134,300,000. Advertisers spent $1,547,700,000 on radio in 1972. This amount includes commissions to advertising agencies, representatives, brokers and others, but does not include advertiser-supplied commercials or programs.

Other sections of this report discuss the financial situation of jukebox operators and cable television systems. The committee's analysis of the economics of those industries and of the broadcasting industry indicates an ability to pay the royalty fees specified in Section 114.

Other copyright payments

Radio and television stations have maintained that they make substantial copyright payments to the composers and copyright proprietors of music and that they should not be required to make additional payments to performing artists and record manufacturers. The committee does not believe that the fact that payments are made to other parties is a decisive factor in determining the disposition of a performance royalty in sound recordings. The amount of the payments made by radio and television stations for the right to perform copyrighted music is negotiated with the performing rights societies, and presumably such stations in future contract discussions would raise the question of the payments being made to artists and record manufacturers.

The committee's position with respect to the arguments advanced in opposition to the performance royalty is consistent with its disposition of the cable television issue in Section 111. Broadcasters and the producers of copyrighted programs have argued that cable television systems which pick up and retransmit broadcasting signals carrying copyrighted programs should pay copyright fees even though the producers of such programs had been compensated by the primary transmitter. It was also argued by the cable operators that the secondary transmissions of cable systems give greater exposure to such programs and confer indirect benefits. The Committee believes that just as cable systems will now be required to pay for the use of copyrighted program material so should broadcasters be required to make copyright payments under the performance royalty.

Limitations on exclusive rights

Subsection (a) of Section 114 specifies that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce, distribute and perform as stated in Section 106. The rights of the owner of copyright in a sound recording are limited to the rights to duplicate the recording in the form of phonorecords that recapture the actual sounds, and to perform those sounds. The rights do not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to the performance of other sounds, even though such sounds imitate or simulate those in the copyrighted recording.

Performance rights distinct

Subsection (b) makes clear that the exclusive right to perform publicly by means of a phonorecord a copyrighted work, and the exclusive right to perform publicly a copyrighted sound recording, are separate and independent rights.

Compulsory license for public performance

Subsection (c)(1) provides that, subject to the provisions of section 111 on cable television and section 116 on jukeboxes, the public performance of a sound recording is subject to compulsory licensing if phonorecords have been distributed to the public under the authority of the copyright owner.

Subsection (c)(2) outlines the procedures to be followed in obtaining a compulsory license and the procedures for depositing with the Register of Copyrights the royalty fee prescribed by this section. It is provided in (c)(3) that the failure to observe these requirements or to deposit the required royalty fee renders the public performance of a sound recording an act of infringement.

Royalty rates

Although a negotiated license may be substituted for the statutory compulsory license, in no case may the negotiated rate amount to less than the statutory rate. The royalty fees may, at the users option, be computed on either a blanket or a prorated basis. For a radio or television station the royalty rate shall be as follows:

(i) In the case of a broadcast station with gross receipts from its advertising sponsors of more than $25,000 but less than $100,000 a year, the yearly performance royalty payment shall be $250; or

(ii) In the case of a broadcast station with gross receipts from its advertising sponsors of more than $100,000 but less than $200,000 a year, the yearly performance royalty shall be $750; or

(iii) In the case of a broadcast station with gross receipts from its advertising sponsors of more than $200,000 a year, the blanket rate shall be one percent of the net receipts from advertising sponsors during the applicable period. The alternative prorated rate is a fraction of one percent of such net receipts, based on a calculation made in accordance with a standard formula that the Register of Copyrights shall prescribe by regulation, taking into account the amount of the station's commercial time devoted to playing copyrighted sound recordings and whether the station is a radio or television broadcaster.

The blanket rate for background music service is 2% of the gross receipts from subscribers or others who pay to receive the transmission.

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The alternative prorated rate is a fraction of 2% of the gross receipts based on a calculation made in accordance with a standard formula prescribed by the Register of Copyrights, taking into account the proportion of time devoted to musical performances, and the extent to which the transmitter is also the owner of copyright in the recordings performed.

The compulsory licensing rates for juke boxes and for secondary transmissions by cable systems are governed exclusively by the *provisions of the respective sections of this legislation.*

For all other users not otherwise exempted, the blanket rate is $25 per year for each location at which sound recordings are performed. The alternative prorated rate is based on the number of separate performances of such works, and in accordance with a standard formula that the Register of Copyrights shall prescribe may not exceed $5 per day of use.

Exemptions

In addition to those users exempted from copyright liability by the provisions of Section 110, subsection (d) exempts from liability for the performance of a sound recording those broadcast stations with gross receipts from advertising sponsors of less than $25,000. In addition background music services or other transmitters of performances of sound recordings with gross receipts from subscribers of less than $10,000 are exempt.

Distribution of royalties

Subsection (e) specifies the procedures whereby those parties entitled to share in the royalty fees for performance may file their claims with the Register of Copyrights. The section further provides that if there is no controversy concerning the distribution of the fees, the Register shall distribute the fees to the claimants. If a controversy concerning the distribution of the royalty fees exists, the Register shall proceed as specified in Chapter 8 relating to the Copyright Royalty Tribunal.

Section 114(c)(3)(A) is an important provision which specifies that one-half of all royalties to be distributed shall be paid to the copyright owners, and the other half shall be paid to the performers. The committee has been advised that this distribution is agreeable to the representatives of the performing artists and the record manufacturers.

Relation to other sections

Subsection (f) states that the public performance of sound recordings by jukeboxes and for secondary transmissions by cable systems is governed by sections 111 and 116 of this legislation, except that there shall be an equal distribution of royalty fees for such performances between copyright owners and performers.

Definitions

Subsection (g) contains definitions of "commercial time", "performers", and "net receipts from advertising sponsors", which are relevant to the construction of section 114. The definition of "performers" is intended to be broad enough to include persons such as arrangers whose contributions to a sound recording in certain cases are more properly considered as a part of the interpretive performance embodied in the sound recording than as a part of the musical composition being performed.

SECTION 115. COMPULSORY LICENSE FOR PHONORECORDS

The provisions of section 1(e) and 101(e) of the present law, establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications and clarifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue in the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by anyone else if he notifies the copyright owner and pays a specified royalty.

The fundamental question of whether to retain the compulsory license or to do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be.

Availability and scope of compulsory license

Subsection (a) of section 115 deals with three doubtful questions under the present law: (1) the nature of the original recording that will make the work available to others for recording under a compulsory license; (2) the nature of the sound recordings that can be made under a compulsory license; and (3) the extent to which someone acting under a compulsory license can depart from the work as written or recorded without violating the copyright owner's right to make an "arrangement" or other derivative work. The first two of these questions are answered in clause (1) of section 115(a), and the third is the subject of clause (2).

The present law, though not altogether clear, apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are distributed to the public. The first sentence of section 115(a)(1) would change the basis for compulsory licensing to authorized public distribution of phonorecords (including disks and audio tapes but not the sound tracks or other sound records accompanying a motion picture or other audiovisual work). Under the clause, a compulsory license would be available to anyone as soon as "phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner."

The second sentence of clause (1), which has been the subject of some debate, provides that "a person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use." This provision was criticized as being discriminatory against background music systems, since it would prevent a background music producer from making recordings without the express consent of the copyright owner; it was argued that this could put the producer at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses. The committee concluded, however, that the purpose of the compulsory license does not extend to manufacturer of phonorecords that are intended primarily for commercial use, including not only broadcasters and jukebox operators but also background music services.

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The final sentence of clause (1) provides that a person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another. The committee has considered the proliferation of litigation in the federal courts concerning whether person making an unauthorized duplication of a musical sound recording originally developed and produced by another is entitled to utilize the compulsory license. While it is the view of the committee that the original intent of the Congress has been correctly stated by the Ninth Circuit in Duchess Music Corp. v. Stern, 458 Fed. 2nd 1305, (1972), which held that the compulsory license was not available to those making unauthorized duplications, this question is still being litigated in a number of other circuits.

The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied. Clause (2) permits arrangements of a work "to the extent necessary to conform it to the style or manner of interpretation of the performance involved," so long as it does not "change the basic melody or fundamental character of the work." The provision also prohibits the compulsory licensee from claiming an independent copyright in his arrangement as a "derivative work" without the express consent of the coyright owner.

Procedure for obtaining compulsory license

Section 115(b)(1) requires anyone who wishes to take advantage of the compulsory licensing provisions to serve a "notice of intention to obtain a compulsory license," which is much like the "notice of intention to use" required by the present law. Under section 115, the notice must be served before any phonorecords are distributed, but service can take place "before or within 30 days after making" any phonorecords. The notice is to be served on the copyright owner, but if the owner is not identified in the Copyright Office records, "it shall be sufficient to file the notice of intention in the Copyright Office."

Section 115(b)(2) requires that the compulsory licensee must, if requested within 10 days after he has served his notice of intention, designate the name of the copyright owner or his agent "on a label or container accompanying each phonorecord of the work distributed by him."

Under the present law, a record manufacturer who fails to serve a "notice of intention to use" is liable to the copyright owner merely for the statutory royalty of 2 cents per record, plus an award of not more than 6 cents per record as damages. The limitation on liability has been strongly criticized as inadequate either to compensate the copyright owner or to deter infringement. Clause (3) of section 115(b) would remove any limitation on liability in this situation by providing that "failure to serve or file the notice required by clause (1) * * * forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506." The same consequences follow from failure "to designate the name of the owner or agent as required by clause (2)." The remedies provided in section 501 are those applicable to infringements generally.

Royalty payable under compulsory license

Identification of copyright owner.—Under the present law a copyright owner is obliged to file a "notice of use" in the Copyright Office, stating that the initial recording of the copyrighted work has been made or licensed, in order to recover against an unauthorized record manufacturer. This requirement has resulted in a technical loss of rights in some cases, and serves little or no purpose where the registration and assignment records of the Copyright Office already show the facts of ownership. Section 115(c)(1) therefore drops any formal "notice of use" requirements and merely provides that "to be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office." The bill further provides that "the owner is entitled to royalties for phonorecords manufactured and distributed after he is so identified but he is not entitled to recover for any phonorecords previously manufactured and distributed."

Basis of royalty.—Under the present statute the specified royalty is payable "on each such part manufactured," regardless of how many "parts" (i.e., records) are sold. This basis for calculating the royalty has been revised in section 115(c)(2) to provide that "the royalty under a compulsory license shall be payable for every phonorecord manufactured and distributed in accordance with the license." The committee concluded that it is unjustified to require a compulsory licensee to pay license fees on records which merely go into inventory, which may later be destroyed, and from which the manufacturer gains no economic benefit. Basing the royalty on records "manufactured and distributed" is more compatible with the general practice with respect to negotiated licenses.

The addition of the words "and distributed" is not intended to disturb existing judicial interpretation of the 1909 Law and its application to licenses issued under that Law, including the joint and several liability of pressers along with record companies.

Rate of royalty.—A large preponderance of the extensive testimony presented to the committee on section 115 was devoted to the question of whether the statutory royalty rate should be left at 2 cents per composition per phonorecord or whether it should be increased. The bill provides that with respect to each work embodied in the phonorecord, the royalty shall be either 3 cents, or ¾ cent per minute of playing time or fraction thereof, whichever amount is larger. During the hearings and subsequently considerable economic data was submitted concerning the establishment of the royalty rate. An analysis of this data was prepared by Edward Knight of the Economics Division of the Legislative Reference Service of the Library of Congress.

The following is a summary of the economic arguments presented during and after the hearings, and of the committee's analysis of them, showing the basis for the royalty rate finally adopted.

1. *The need for an increase by music publishers.*—One of the astounding things about the present copyright law is that a flat maximum fee of 2 cents per phonorecord, established as part of a compromise during the beginnings of the record industry, has remained unchanged through the economic and technological vicissitudes of nearly 58 years.

Since 2 cents in 1909 is worth well over 6 cents today, and in view of current inflationary trends, the copyright owners urged that the injustice of the present 2-cent ceiling is self-evident. They also argued that in 1909 music publishers were well established and record companies were in their infancy, and that their relative bargaining positions today are reversed: they characterized the record industry as a giant with a dominating position, while the music publishers may face extinction unless their bargaining power is improved. The copyright owners stressed that music publishers perform a vital creative function, which is necessary for the record manufacturers and which entails substantial expenses in developing, promoting, and exploiting particular songs.

In contradiction, the record producers presented statistics aimed at showing that an increase in the statutory fee from 2 to 3 cents would be inequitable. They argued that inflationary trends since 1909 are meaningless when viewed in light of the tremendous increase in the volume of records sold, the great decrease in record prices, the introduction of longplaying records containing 12 selections (with a statutory royalty for each), and the millions of dollars received by copyright owners from broadcasts of records. They asserted that, unlike the music publishers who gets income from many sources, including public performances made possible by records, the record producers derive profits solely from his sale of records, whose value and creative character is largely the result of his efforts and expenditures rather than those of the music publisher. They claimed, on the basis of statistical tables, that copyright owners receive substantially greater financial gains from the phonorecord industry than the performing talent, or the supporting talent, or the record companies themselves; that copyright owners are now being paid a far greater total sum than ever before; and that they are also receiving a far greater percentage of the industry's sales dollar than in 1909. On this last point, the record producers argued that the 1909 statute was designed to give copyright owners about 5 percent of the manufacturer's wholesale selling price, while the share today is around 15 percent.

2. *Potential impact of increase on record industry.*—Much of the statistical data presented by the record producers at the hearings was in support of the argument that an increase in the rate would have a grave impact on the entire record industry, including manufacturers, artists, performing talent, distributors, retailers, and even copyright holders. According to their interpretation of the figures, the total increase in annual dollar payments to copyright owners would be several times the size of the profits in recent years of the record companies, whose profits are already squeezed to the minimum and who cannot absorb such an increase. They asserted that, unless the sale prices of records were to be raised considerably, the higher royalty would generate irresistible pressures tending to force out many companies, especially smaller ones, and similar pressures would operate on wholesalers and retailers. Ultimately, they argued, the level of activity in the industry and the number of new recordings would be seriously depressed, and strong forces would be unleashed to restructure the industry, impairing competitition and leading to concentration of control. They maintained that some 80 percent of all releases lose money (although copyright owners still receive their royalties on them), and that the net profit of record companies in the last year for which adequate data was available amounted only 3.8 percent.

In reply, the copyright owners pointed out that profit figures can be misleading in an industry where major record companies are units (divisions, subsidiaries, or affiliates) of large diversified corporations operating in the entertainment field, and where interownership between record producers and broadcasters, film makers, music publishers, and recording artists is common. They claimed, moreover, that all major record companies, and at least 90 percent of all record companies, have their own distributing units, including "record clubs," so that many transactions are intracompany with total profits going to the same organization. The music publishers strongly criticized the figures presented by record producers on the ground that, to support the conclusion that copyright owners derive more from record sales than record companies, the effect had been to compare gross revenue of copyright owners with record companies' net profits. The record companies challenged the music publishers to present comparative profit figures. The Subcommittee on Patents, Trademarks, and Copyrights submitted a questionnaire on this subject to the music publishers and the limited data received as a result has been analyzed in the report of the Legislative Reference Service of the Library of Congress.

3. *Potential impact of increase on consuming public.*—On the basis of the situation existing at the time of the hearings, the record producers predicted an increased price to consumers of 20 cents per $3.98 longplaying record, or a total of possibly $30 million per year, if the statutory rate were raised to 3 cents. This prediction assumed that the record manufacturer could not absorb any of the 12-cent increase on a record containing 12 selections, and that record marketers in turn would have to pass the increase on down the line to the consumer, with each distributor adding an increment to his price because of his added costs and risks. Moreover, the record producers forecast that the variety of musical offerings would be restricted; that the quality of musical offerings would deteriorate; that composers, especially unknowns, would find fewer opportunities for having their works recorded; that record manufacturers would have to avoid risks on new and unusual compositions, reduce the number and length of selections, record fewer serious works, and rely more on the public domain for popular material.

In response to these predictions the copyright owners argued that the process of economic life precludes any meaningful prophecies concerning possible increases in consumer prices. They asserted that an increase is by no means certain, and that it is equally possible for some or all of the added input price to be absorded or to result in more selectivity in production. Citing the record industry's own statement, they pointed out that at present 74 percent of single records, 61 percent of popular longplaying records, and 87 percent of classical records fail to earn a profit; raising the rate to 3 cents would raise the percentages of these unprofitable releases only slightly: 2 percent for singles, 3 percent for popular LP's, and from 1 to 3 percent for classical LP's. The increase would, according to the copyright owners, provide authors with an added incentive to write and would, if it had any effect at all, be likely to increase competition.

4. *The statutory fee as a ceiling or as an established rate.*—One of the principal arguments of the copyright owners was that, in contrast to record manufacturers whose prices are not fixed and who are not

obliged to pay copyright owners any minimum amount, the authors and publishers are deprived of any right to bargain above the 2-cent ceiling. They stressed that the statutory rate is merely a maximum: the record manufacturer can always negotiate for less, but the copyright owner can never ask for more. They contended that the vast majority of records are made under written agreements with the rate, below 2 cents, varying according to the bargaining position of the parties; nearly all agreements are based on records sold rather than made; record club sales are at three-fourths of the contracted rate, and nothing is paid for records distributed "free" under various sales and promotional plans. Moreover, a survey of royalty payments made during the second quarter of 1965 by 3 of the largest record companies, to the 6 publishing companies receiving the largest payment from each of the record companies (13 publishing companies in all), showed that out of the 31,600,000 phonorecords covered, some 35 percent paid a royalty of 2 cents, while 65 percent paid less; in money actually paid, just under half of the fees were at 2 cents. According to the copyright owners, these figures demonstrate that the statutory rate is an absolute and effective ceiling, with substantial variations below it; if the ceiling is raised there would be more room for negotiation, but it would not mean that all license fees would immediately rise to 3 cents.

On the other side, the record producers argued that as a practical matter the statutory rate establishes the fee actually paid in most instances, and that for business reasons it is impossible for individual companies to bargain for special discriminatory rates for particular compositions. They cited a survey of some 1,400 selections issued by two major record companies during randomly selected months in 1964 and 1965, which found that some 73 percent of all copyright licenses (as distinguished from phonorecords sold) were at the 2-cent rate, and that of the remaining 27 percent the vast majority represented regular, stereotyped variations below the standard of 2 cents. When challenged as to the size of this sample, the record producers responded by alleging that, by extrapolation, the sample of 1,400 "selections" represents roughly 41 million phonorecords sold, and that since no one knows how many records will be sold when a license is signed, the relevant figure is the number of licenses at 2 cents rather than the number of license fees paid at 2 cents. Their basic position on this point is that a 1-cent increase would simply establish a higher prevailing rate rather than providing more "room for negotiation."

Committee conclusion

While upon initial review it might be assumed that a rate established in 1909 would not be reasonable at the present time, the committee believes that an increase in the mechanical royalty rate must be justified on the basis of existing economic conditions and not on the mere passage of sixty years. Much of the data submitted by the parties was incomplete and somewhat superseded by events. The committee has made its own evaluation of the relevant data. On the basis of this review the committee has concluded that a flat rate of 2 cents is too low, and that the proponents of an increase in the mechanical royalty rate have not justified an increase above a basic rate of 3 cents. Therefore, the bill provides that the mechanical rate shall be 3 cents, or ¾ cent per minute of playing time, whichever amount is larger.

Accounting and payment of royalties; effect of default

Clause 3 of Section 115(c) provides that statements of account and royalty payments are to be made on a monthly basis. Each payment shall be accompanied by a detailed statement of account which shall be certified by a Certified Public Accountant and comply with requirements that the Register of Copyrights shall prescribe by regulation. In order to increase the protection of copyright proprietors against economic harm from companies which might refuse or fail to pay their just obligations, compulsory licensees will be required to make a monthly accounting certified by a Certified Public Accountant.

A source of criticism with respect to the compulsory licensing provisions of the present statute has been the rather ineffective sanctions against default by compulsory licensees. Clause (4) of section 115(c) corrects this defect by permitting the copyright owner to serve written notice on a defaulting licensee, and by providing for termination of the compulsory license if the default is not remedied within 30 days after notice is given. Termination under this clause "renders the making and distribution of all phonorecords, for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506."

SECTION 116. PERFORMANCES ON COIN-OPERATED PHONORECORD PLAYERS

General background of the problem

No provision of the present law has attracted more heated denunciations and controversy than the so-called jukebox exemption of section 1(e). This paragraph, which has remained unchanged since its enactment in 1909, provides that—

> The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

This blanket exemption has been widely and vigorously condemned as an anachronistic "historical accident" and in terms such as "unconscionable," "indefensible," "totally unjustified," and "grossly discriminatory."

Efforts to repeal the clause have been going on for more than 40 years, and between 1947 and 1965 there had been some 25 days of congressional hearings devoted to the subject. In August 1958 this committee reported S. 1870 of the 85th Congress to repeal the jukebox exemption and to provide that the reproduction of a copyrighted musical composition through the medium of a jukebox shall be deemed a public performance for profit.

The following summarizes the arguments against retaining the exemption:

1. The exemption for coin-operated machines was added to the 1909 act at the last moment, and its consequences were completely unforeseen. The coin-operated music player of today is not comparable to the player pianos and "penny parlor" mechanisms in use in 1909, and the unanticipated effect of the provision, creating a blanket exemption for a large industry that is based on use of

copyrighted material, represents the "core defect" in the present law.

2. The exemption not only deprives copyright owners of revenue to which they are fairly entitled, but it also discriminates against all other commercial users who must pay in order to perform copyrighted music. In the past 30 years the jukebox industry has become strong and prosperous by taking a free ride on the hits created and developed by authors and publishers. Jukebox operators, alone in the entertainment field, continue to use others' property for profit without payment.

3. The exemption also creates serious international problems. It is obviously unfair for U.S. composers to be paid when their songs are used in jukeboxes abroad, but for foreign composers to be deprived of revenue from jukebox uses of their compositions in this country. The problem is particularly acute with respect to Canada. Jukebox royalties in foreign countries at the time of the hearings averaged between $40 and $50 per machine annually.

4. It is difficult to find support for the argument that jukebox operators cannot afford to pay for use of the very property they must have in order to exist: copyrighted music. Revenues from jukebox performances gross approximately $500 million annually of which the copyright owners receive nothing.

The following summarizes the principal arguments made by jukebox operators and manufacturers for retaining the present exemption:

1. The exemption in section 1(e) was not an accident or anomaly, but a carefully conceived compromise. Congress in 1909 realized that the new royalties coming to copyright owners from mechanical sound reproductions of their works would be so substantial that in some cases fees for performances resulting from the use of mechanical reproductions would not be justified. Automatic phonographs were widely known and used in 1909.

2. The present law does not discriminate in favor of jukebox operators, but removal of the exemption would discriminate against them: jukebox performances are really forms of incidental entertainment like relays to hotel rooms or turning on a radio in a barber shop, and should be completely exempted like them. The industry buys more than 50 million records per year which, under the present mechanical royalty of 2 cents per composition or 4 cents per record, means that jukebox operators are indirectly paying copyright owners over $2 million a year now and would be paying them more under any increased mechanical royalty in the bill. No one has shown why this is not ample. Moreover, jukeboxes use hit records rather than hit compositions, and the composition is usually not the most important factor in the success of a record; jukeboxes represent an effective plugging medium that promotes record sales and hence mechanical royalties.

3. The operation of coin-operated phonographs is a declining business.

Conclusions reached by the committee

The committee's basic conclusions can be summarized as follows:

1. The present blanket jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no

longer, and one class of commercial users of music should not be completely absolved from liability when none of the others enjoys any exemption.

2. Performances on coin-operated phonorecord players should be subject to a compulsory license (that is, automatic clearance) with statutory fees. Unlike other commercial music users, who have been subject to full copyright liability from the beginning and have made the necessary economic and business adjustments over a perod of time, the whole structure of the jukebox industry has been based on the existence of the copyright exemption.

3. The most appropriate basis for the compulsory license is a statutory per box fee, with a mechanism for periodic review and adjustment of the per box fee. Such a mechanism is afforded by the Copyright Royalty Tribunal.

4. This committee in 1958 recommended an average annual per box payment of $19.70. The most recent hearings on the jukebox question did not provide any indication that the committee's decision in 1958 was unwise or the rate of payment unreasonable. In providing in this legislation for a total payment of $8 per box, of which ⅛ shall be allocated to the copyright owners and performers of sound recordings, the committee has been greatly influenced by the desire to conform to the rate provided in the copyright legislation passed by the House of Representatives during the 90th Congress. Therefore, although a higher rate would be warranted, the committee has endeavored to facilitate the progress of this legislation by preserving, to the extent possible in view of other provisions of this bill, the rate adopted by the House of Representatives.

Limitations on exclusive right

The compulsory licensing provisions in section 116 have been patterned after those in section 115, although there are differences. One difference occurs in the first subsection: section 116(a) not only provides "the operator of the coin-operated phonorecord player" with the opportunity of obtaining "a compulsory license to perform the work publicly on that phonorecord player," but also exempts entirely under certain conditions "the proprietor of the establishment in which the public performance takes place." As provided by clause (1), the proprietor is not liable for infringement unless he is also "the operator of the phonorecord player" or unless he refuses or fails to dislcose the operator's identity upon request.

As defined in section 116(e)(2), an "operator" is anyone who, alone or jointly: (1) owns a coin-operated phonorecord player; (2) "has the power to make the * * * player available for placement in an establishment for purposes of public performance"; or (3) "has the power to exercise primary control over the selection of the musical works made available for public performance" in the machine. Several different persons may be "operators" of the same coin-operated phonorecord player under this definition, but they would not include the "location owner" in the ordinary case where he merely provides a place for the machine to be used.

In contrast to the present statute, which merely refers to a "coin-operated machine," section 116(e)(1) of the bill contains a detailed definition of "coin-operated phonorecord player." Under the definition a machine or device would be considered a "coin-operated phonorecord player" only if it meets all of four specified conditions:

1. It must be used for no purpose other than the "performance of nondramatic musical works by means of phonorecords" and, in order to perform that function, it must be "activated by the insertion of a coin." The definition would thus exclude coin-operated radio and television sets, as well as devices similar to jukeboxes that perform musical motion pictures.
2. The establishment where the machine is located must make "no direct or indirect charge for admission." This requirement, which has its counterpart in section 1(e) of the present law, would exclude establishments making cover or minimum charges, and those "clubs" open to the public but requiring "membership fees" for admission.
3. The phonorecord player must be "accompanied by a list of the titles of all the musical works available for performance on it," and the list must either be affixed to the machine itself or "posted in the establishment in a prominent position where it can be readily examined by the public." This condition would not be satisfied if the list is available only on request.
4. Finally, the machine must provide "a choice of works available for performance," and must allow "the choice to be made by the patrons of the establishment in which it is located." Thus, a machine that merely provides continuous music without affording any choice as to the specific compositon to be played at a particular time, or a case where selections are made by someone other than patrons of the establishment, would be outside the scope of the definition.

Clause 2 of section 116(a) provides that a jukebox operator may obtain a compulsory license to perform copyrighted works by complying with the requirements of this section.

Procedures

Section 116(b)(1) sets forth the requirements that an operator must observe in order to obtain a compulsory license. The operator is required to file in the Copyright Office an application containing certain information and deposit with the Register of Copyrights a $8 royalty fee for each box. If performances on a particuler box are made for the first time after July 1, the royalty fee for the remainder of that year shall be $4.00.

The Register of Copyrights is required to issue to the applicant a certificate for each machine and the operator is required to affix the certificate to the particular box. Failure to observe these requirements renders the public performance an act of infringement and fully liable ro the statutory remedies.

Distribution of royalties

Section 116(c) establishes the procedures for the distribution of the royalties paid by jukebox operators. During the month of January each person who believes he is entitled to share in the royalties shall file a claim with the Register of Copyrights. After the first of October the Register shall determine whether there exists a controversy concerning the distribution of the royalty fees. If he determines that there is no controversy, he shall, after deducting his reasonable administrative costs, distribute the fees to the respective claimants. If he determines that there is a controversy concerning the distribution of royalty fees, he shall proceed to establish a panel of the Copyright Royalty Tribunal as provided in Chapter 8.

Section 116(c)(3) enumerates the formula for the distribution of royalty fees. It is provided that ⅛ of the fees distributed shall be allocated to copyright owners and performers of sound recordings, and that such fees shall be divided equally between them. With respect to the fees allocated to owners of copyright in nondramatic musical works, every copyright owner not affiliated with a performing rights society shall receive his pro rata share and the balance shall be allocated to be distributed in pro rata shares. The Register of Copyrights is authroized to withhold an amount sufficient to satsify all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

Section 116(c)(4) directs the Register of Copyrights to promulgate regulations whereby those persons who can reasonably be expected to have claims may, without expense or harassment of jukebox operators or the proprietors of establishments in which jukeboxes are located, have access to such establishments and to the boxes, to obtain information that may be reasonably necessary to determine the proportion of the contribution of the musical works of each person to the earnings of the particular jukebox. A person who is denied access to the establishment and the jukeboxes may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the jukebox to which access has been denied, and the court may declare the compulsory license invalid. This clause is not intended to authorize the Register of Copyrights to impose any record-keeping requirements upon jukebox operators, or to require the installation in jukeboxes of any metering devices for counting the play of particular recordings.

SECTION 117. COMPUTER USES

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work "in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information." The Commission on New Technological Uses established by Title II is intended, among other things, to make a thorough study of the emerging patterns in this field and, on the basis of its finding, to recommend definite copyright provisions to deal with the situation.

Since it would be premature to change existing law on computer uses at present, the purpose of section 117 is to preserve the status quo. It is intended neither to cut off any rights that may now exist, nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable.

The provision deals only with the exclusive rights of a copyright owner with respect to computer uses, that is, the bundle of rights

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specified for other types of uses in section 106 and qualified in Sections 107 through 116. With respect to the copyrightability of computer programs, the ownership of copyright in them, the term of protection, and the formal requirements of the remainder of the bill, the new statute would apply.

Under section 117, an action for infringement of a copyrighted work by means of a computer would necessarily be a federal action brought under the new Title 17. The court, in deciding the scope of exclusive rights in the computer area, would first need to determine the applicable law, whether State common law or the Act of 1909. Having determined what law was applicable, its decision would depend upon its interpretation of what that law was on the point on the day before the effective date of the new statute.

SECTION 201. OWNERSHIP OF COPYRIGHT

Initial ownership

Two basic and well-established principles of copyright law are restated in section 201(a): that the source of copyright ownership is the author of the work, and that, in the case of a "joint work," the coauthors of the work are likewise coowners of the copyright. Under the definition in section 101, a work is "joint" if the authors collaborated with each other, or if each of the authors prepared his contribution with the knowledge and intension that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either "inseparable" (as in the case of a novel or painting) or "interdependent" (as in the case of a motion picture, opera, or the words and music of a song). The definition of "joint work" is to be contrasted with the definition of "collective work," also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of "separate and independent works * * * into a collective whole."

The definition of "joint works" has prompted some concern lest it be construed as converting the authors of previously written works, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated. It is true that a motion picture would normally be a joint rather than a collective work with respect to those authors who actually work on the film, although their usual status as employees for hire would keep the question of coownership from coming up. On the other hand, although a novelist, playright, or songwriter may write with the hope or expectation that his work will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use. In this case, the motion picture is a derivative work within the definition of that term, and section 103 makes plain that copyright in a derivative work is independent of, and does not enlarge the scope of rights in, any preexisting material incorporated in it. There is thus no need to spell this conclusion out in the definition of "joint work."

There is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work; court-made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners or any profits.

Works made for hire

Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. The subsection also requires that any agreement under which the employee is to own rights be in writing and signed by the parties.

The work-made-for-hire provisions of this bill represent a carefully-balanced compromise, and as such they do not incorporate the amendments proposed by screenwriters and composers for motion pictures. Their proposal was for the recognition of something similar to the "shop right" doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extent needed for purposes of his regular business, but the employee would retain all other rights as long as he refrained from authorizing competing uses. However, while this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange it for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.

The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.

Of these, one of the most important categories is that of "instructional texts." This term is given its own definition in the bill: "a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities." The concept is intended to include what might loosely be called "textbook material," whether or not in book form or prepared in the form of text matter. The basic characteristic of "instructional texts" is the purpose of their preparation for "use in systematic instructional activities," and they are to be distinguished from works prepared for use by a general readership.

Another specific category under the definition of "works made for hire" is "a photographic or other portrait of one or more persons."

Works of this sort are frequently commissioned and should be considered "works made for hire" if, as in the other specified categories, both of the parties sign a written agreement to this effect.

Contributions to collective works

Subsection (c) of section 201 deals with the troublesome problem of ownership of copyright in contributions to collective works, and the relationship between copyright ownership in a contribution and in the collective work in which it appears. The first sentence establishes the basic principle that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct, and that the author of the contribution is, as in every other case, the first owner of copyright in it. Under the definitions in section 101, a "collective work" is a species of "compilation" and, by its nature, must involve the selection, assembly, and arrangement of "a number of contributions." Examples of "collective works" would ordinarily include periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors, but not cases, such as a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays, where relatively few separate elements have been brought together. Unlike the contents of other types of "compilations," each of the contributions incorporated in a "collective work" must itself constitute a "separate and independent" work, therefore ruling out compilations of information or other uncopyrightable material and works published with editorial revisions or annotations. Moreover, as noted above, there is a basic distinction between a "joint work," where the separate elements merge into a unified whole, and a "collective work," where they remain unintegrated and disparate.

The bill does nothing to change the rights of the owner of copyright in a collective work under the present law. These exclusive rights extend to the elements of compilation and editing that went into the collective work as a whole, as well as to the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors. However, one of the most significant aims of the bill is to clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions.

The second sentence of section 201(c), in conjunction with the provisions of section 404 dealing with copyright notice, will preserve the author's copyright in his contribution even if the contribution does not bear a separate notice in his name, and without requiring any unqualified transfer of rights to the owner of the collective work. This is coupled with a presumption that, unless there has been an express transfer of more, the owner of the collective work acquires "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publisher could reprint a contribution from one issue in a later issue of his magazine, or could reprint an article from a 1975 edition of an encyclopedia in a 1985 revision of it; he could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

Transfer of ownership

The principle of unlimited alienability of copyright is stated in clause (1) of section 201(d). Under that provision the ownership of a copyright, or of any part of it, may be transferred by any means of conveyance or by operation of law, and is to be treated as personal property upon the death of the owner. The term "transfer of copyright ownership" is defined in section 101 to cover any "conveyance, alienation, or hypothecation," including assignments, mortgages, and exclusive licenses, but not including nonexclusive licenses. Representatives of motion picture producers have argued that foreclosures of copyright mortgages should not be left to varying State laws, and that the statute should establish a Federal foreclosure system. However, the benefits of such a system would be of very limited application, and would not justify the complicated statutory and procedural requirements that would have to be established.

Clause (2) of subsection (d) contains the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately. The definition of "transfer of copyright ownership" in section 101 makes clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect," and another definition in the same section provides that the term "copyright owner," with respect to any one exclusive right, refers to the owner of that particular right. The last sentence of section 201(d)(2) adds that the owner, with respect to the particular exclusive right he owns, is entitled "to all of the protection and remedies accorded to the copyright owner by this title." It is thus clear, for example, that a local broadcaster who has an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time could sue, in his own name as copyright owner, someone who infringed that particular exclusive right.

SECTION 202. DISTINCTION BETWEEN OWNERSHIP OF COPYRIGHT AND MATERIAL OBJECT

The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonerecord—the original manuscript, the photographic negative, the unique painting or statue, the master tape recording, etc.—in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.

As a result of the interaction of this section and the provisions of sections 204(a) and 301, the bill would change a common law doctrine exemplified by the decision in *Pushman* v. *New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E. 2d 249 (1942). Under that doctrine, an author or artist is generally presumed to transfer his common law literary property rights when he sells his manuscript or work of art, unless he specifically reserves them. This presumption would be reversed under the bill, since a specific written conveyance of rights would be required in order for a sale of any material object to carry with it a transfer of copyright.

SECTION 203. TERMINATION OF TRANSFERS AND LICENSES

The problem in general

The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.

Scope of the provision

Instead of being automatic, as is theoretically the case under the present renewal provision, the termination of a transfer or license under section 203 would require the serving of an advance notice within specified time limits and under specified conditions. However, although affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away. Under section 203(a) the right of termination would apply only to transfer and licenses executed after the effective date of the new statute, and would have no retroactive effect.

The right of termination would be confined to inter vivos transfers or licenses executed by the author, and would not apply to transfers by his successors in interest or to his own bequests. The scope of the right would extend not only to any "transfer of copyright ownership," as defined in section 101, but also to nonexclusive licenses. The right of termination would not apply to "works made for hire," which is one of the principal reasons the definition of that term assumed importance in the development of the bill.

Who can terminate a grant

Two issues emerged from the disputes over section 203 as to the persons empowered to terminate a grant: (1) the specific classes of beneficiaries in the case of joint works; and (2) whether anything less than unanimous consent of all those entitled to terminate should be required to make a termination effective. The bill to some extent reflects a compromise on these points, including a recognition of the dangers of one or more beneficiaries being induced to "hold out" and of unknown children or grandchildren being discovered later. The provision can be summarized as follows:

(1) In the case of a work of joint authorship, where the grant was signed by two or more of the authors, majority action by those who signed the grant, or by their interests, would be required to terminate it.

(2) There are three different situations in which the shares of joint authors, or of a dead author's widow, children, and grandchildren, must be divided under the statute: (1) the right to effect a termination, (2) the ownership of the terminated rights, and (3) the right to make further grants of reverted rights. The respective shares of the authors, and of a dead author's widow, children, and grandchildren, would be divided in exactly the same way in each of these situations. The terms "widow," "widower," and "children" are defined in section 101 in an effort to avoid problems and uncertainties that have arisen under the present renewal section.

(3) The principle of per stirpes representation would also be applied in exactly the same way in all three situations. Take, for example, a case where a dead author left a widow, two living children, and three grandchildren by a third child who is dead. The widow will own half of the reverted interests, the two children will each own 16⅔ percent, and the three grandchildren will each own a share of roughly 5½ percent. But who can exercise the right of termination? Obviously, since she owns 50 percent, the widow is an essential party, but suppose neither of the two surviving children is willing to join her in the termination; is it enough that she gets one of the children of the dead child to join, or can the dead child's interest be exercised only by the action of a majority of his children? Consistent with the per stirpes principle, the interest of a dead child can be exercised only as a unit by majority action of his surviving children. Thus, even though the widow and one grandchild would own 55½ percent of the reverted copyright, they would have to be joined by another child or grandchild in order to effect a termination or a further transfer of reverted rights. This principle also applies where, for example, two joint authors executed a grant and one of them is dead; in order to effect a termination, the living author must be joined by a per stirpes majority of the dead author's beneficiaries. The notice of termination may be signed by the specified owners of termination interests or by "their duly authorized agents," which would include the legally appointed guardians or committees of persons incompetent to sign because of age or mental disability.

When a grant can be terminated

Section 203 draws a distinction between the date when a termination becomes effective and the earlier date when the advance notice of termination is served. With respect to the ultimate effective date, section 203(a)(3) provides, as a general rule, that a grant may be terminated during the 5 years, following the expiration of a period of 35 years from the execution of the grant. As an exception to this basic 35-year rule, the bill also provides that "if the grant covers the right of publication of the work, the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier." This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.

The effective date of termination, which must be stated in the advance notice, is required to fall within the 5 years following the end of the applicable 35- or 40-year period, but the advance notice itself must be served earlier. Under section 203(a)(4)(A), the notice must be served "not less than two or more than ten years" before the effective date stated in it.

As examples of how these time-limit requirements would operate in practice, we suggest two typical contract situations:

Case 1: Contract for theatrical production signed on September 1, 1975. Termination of grant can be made to take effect between September 1, 2010 (35 years from execution) and September 1, 2015 (end of 5-year termination period). Assuming that the author decides to terminate on September 1, 2010 (the earliest possible date), his advance notice must be filed between September 1, 2000, and September 1, 2008.

Case 2: Contract for book publication executed on April 10, 1980; book finally published on August 23, 1987. Since contract covers the right of publication, the 5-year termination period would begin on April 10, 2020 (40 years from execution) rather than April 10, 2015 (35 years from execution) or August 23, 2222 (35 years from publication). Assume that the author decides to make the termination effective on January 1, 2224, he would have to serve his advance notice between January 1, 2214, and January 1, 2222.

Effect of termination

Section 203(b) makes clear that, unless effectively terminated within the applicable 5-year period, all rights covered by an existing grant will continue unchanged, and that right under other Federal, State, or foreign laws are unaffected. However, assuming that a copyright transfer or license is terminated under section 203, who are bound by the termination and how are they affected?

Under the bill, termination means that ownership of the rights covered by the terminated grant reverts to everyone who owns termination interests on the date the notice of termination was served, whether they joined in signing the notice or not. In other words, if a person could have signed the notice, he is bound by the action of the majority who did; the termination of the grant will be effective as to him, and a proportionate share of the reverted rights automatically vests in him. Ownership is divided proportionately on the same per stirpes basis as that provided for the right to effect termination under section 203(a) and, since the reverted rights vest on the date notice is served, the heirs of a dead beneficiary would inherit his share.

Under clause (3) of subsection (b), majority action is required to make a further grant of reverted rights. A problem here, of course, is that years may have passed between the time the reverted rights vested

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and the time the new owners want to make a further transfer; people may have died and children may have been born in the interim. To deal with this problem, the bill looks back to the date of vesting; out of the group in whom rights vested on that date, it requires the further transfer or license to be signed by "the same number and proportion of the owners" (though not necessarily the same individuals) as were then required to terminate the grant under subsection (a). If some of those in whom the rights originally vested have died, their "legal representatives, legatees, or heirs at law" may represent them for this purpose and, as in the case of the termination itself, any one of the minority who does not join in the further grant is nevertheless bound by it.

An important limitation on the rights of a copyright owner under a terminated grant is specified in section 203(b)(1). This clause provides that, notwithstanding a termination, a derivative work prepared earlier may "continue to be utilized" under the conditions of the terminated grant; the clause adds, however, that this privilege is not broad enough to permit the preparation of other derivative works. In other words, a film made from a play could continue to be licensed for performance after the motion picture contract had been terminated, but any remake rights covered by the contract would be cut off. For this purpose, a motion picture would be considered as a "derivative work" with respect to every "preexisting work" incorporated in it, whether the preexisting work was created independently or was prepared expressly for the motion picture.

Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running. However, the bill seeks to avoid the situation that has arisen under the present renewal provision, in which third parties have bought up contingent future interests as a form of speculation. Section 203(b)(2) would make a further grant of rights that revert under a terminated grant valid "only if it is made after the effective date of the termination." An exception, in the nature of a right of "first refusal," would permit the original grantee or his successor to negotiate a new agreement with the persons effecting the termination at any time after the notice of termination has been served.

SECTIONS 204, 205. EXECUTION AND RECORDATION OF TRANSFERS

Section 204 is a somewhat broadened and liberalized counterpart of sections 28 and 29 of the present statute. Under subsection (a), a transfer of copyright ownership (other than one brought about by operation of law) is valid only if there exists an instrument of conveyance, or alternatively a "note or memorandum of the transfer," which is in writing and signed by the copyright owner "or his duly authorized agent." Subsection (b) makes clear that a notarial or consular acknowledgment is not essential to the validity of any transfer, whether executed in the United States or abroad. However, the subsection would liberalize the conditions under which certificates of acknowledgment of documents executed abroad are to be accorded prima facie weight, and would give the same weight to domestic acknowledgments under appropriate circumstances.

The recording and priority provisions of section 205, are intended to clear up a number of uncertainties arising from sections 30 and 31 of the present law and to make them more effective and practical in operation. Any "document pertaining to a copyright" may be recorded under subsection (a) if it "bears the actual signature of the person who executed it," or if it is appropriately certified as a true copy. However, subsection (c) makes clear that the recorded document will give constructive notice of its contents only if two conditions are met: (1) the document or attached material specifically identifies the work to which it pertains so that a reasonable search under the title or registration number would reveal it, and (2) registration has been made for the work. Moreover, even though the Register of Copyrights may be compelled to accept for recordation documents that on their face appear self-serving or colorable, he should take care that their nature is not concealed from the public in his indexing and search reports.

The provisions of subsection (d), requiring recordation of transfers as a prerequisite to the institution of an infringement suit, represent a desirable change in the law. The 1 and 2 month grace periods provided in subsection (e) represent a reasonable compromise between those who want a longer hiatus and those who argue that any grace period makes it impossible for a bona fide transferee to rely on the record at any particular time.

Under subsection (f) of section 205, a nonexclusive license in writing and signed, whether recorded or not, would be valid against a later transfer, and would also prevail as against a prior unrecorded transfer if taken in good faith and without notice. Objections were raised by motion picture producers, particularly to the provision allowing unrecorded nonexclusive licenses to prevail over subsequent transfers, on the ground that a nonexclusive license can have drastic effects on the value of a copyright. On the other hand, the impracticalities and burdens that would accompany any requirement of recordation of nonexclusive licenses outweigh the limited advantages of a statutory recordation system for them.

SECTION 301. FEDERAL PREEMPTION OF RIGHTS EQUIVALENT TO COPYRIGHT

Single Federal system

Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of the dual system of "common law copyright" for unpublished works and statutory copyright for published works, which has been in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation. Under section 301 a work would obtain statutory protection as soon as it is "created" or, as that term is defined in section 101, when it is "fixed in a copy or phonorecord for the first time." Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain.

By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship. The main arguments in favor of a single Federal system, can be summarized as follows:

(1) One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.

(2) "Publication," perhaps the most important single concept under the present law, also represents its most serious defect. Although at one time, when works were disseminated almost exclusively through printed copies, "publication" could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given "publication" a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would help to clear up this chaotic situation.

(3) Enactment of section 301 would also implement the "limited times" provision of the Constitution, which has become distorted under the traditional concept of "publication." Common law protection in "unpublished" works is now perpetual, no matter how widely they may be disseminated by means other than "publication"; the bill would place a time limit on the duration of exclusive rights in them. The provision would also aid scholarship and the dissemination of historical materials by making unpublished, undisseminated manuscrpts available for publication after a reasonable period.

(4) Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance.

Under section 301, the statute would apply to all works created after its effective date, whether or not they are ever published or disseminated. With respect to works created before the effective date of the statute and still under common law protection, section 303 of the statute would provide protection from that date on, and guarantees a minimum period of statutory copyright.

Preemption of State law

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any possible misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

Under section 301(a), "all rights in the nature of copyright"—which are specified as "copyright, literary property rights, or any equivalent legal or equitable right"—are governed exclusively by the Federal copyright statute if the work involved is of a kind covered by the statute. All corresponding State laws, whether common law or statutory, are preempted and abrogated. Regardless of when the work was created and whether it is published or unpublished, disseminated or undisseminated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copy right. Section 1338 of title 28, United States Code, also makes clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts. The preemptive effect of section 301 is limited to State laws; there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article 3, section 8.

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain. On the other hand, the 1965 bill implicitly preserved common law copyright protection for one important class of works: works that have not been "fixed in any tangible medium of expression." Examples would include choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down. As mentioned above in connection with section 102, unfixed works are not included in the specified "subject matter of copyright." They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under State statutes or common law until fixed in tangible form. Because of the significance of this principle, the committee amended section 301(b) of the 1965 bill to make it explicit.

The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been. The most striking example of this is found in the case of sound recordings, which are brought under the Federal statute for the first time, but which are given limited rights under section 114.

Representatives of printers, while not opposed to the principle of section 301, expressed concern about its potential impact on protection of preliminary advertising copy and layouts prepared by printers. They argued that this material is frequently "pirated" by competitors, and that it would be a substantial burden if, in order to protect himself, the printer would have to register his works and bear the expense and bother of suing in Federal rather than State courts. On the other hand, these practical problems are essentially procedural rather than substantive, and the proposal for a special exemption to preserve common law rights equivalent to copyright in unpublished advertising material cannot be justified. Moreover, subsection (b), discussed below, will preserve other legal grounds on which the printers can protect themselves against "pirates" under State laws.

In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234, that preemption does not extend to causes of action, or unpublished subject matter, outside the scope of the revised Federal copyright statute.

The numbered clauses of subsection (b) list three general areas left unaffected by the preemption: (1) unpublished material outside the subject matter of copyright; (2) causes of action arising under State law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright. Clause (1) is limited to unpublished material to make clear that there is no intention to change the established doctrine of *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834), and many later cases: that common law protection in a work terminates upon its publication. Use of the word "unpublished" avoids any implication that common law protection equivalent to copyright, for material outside the subject matter of the statute, might continue after "publication" as that term is defined in section 101.

The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract; however, to the extent that the unfair competition concept known as "interference with contract relations" is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)—"deceptive trade practices such as passing off and false representation"—represents an effort to distinguish between those causes of action known as "unfair competition" that the copyright statute is not intended to preempt and those that it is. Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute. However, where the cause of action involves the form of "unfair competition" commonly referred to as "misappropriation," which is nothing more than copyright protection under another name, section 301 is intended to have preemptive effect.

SECTION 302. DURATION OF COPYRIGHT IN WORKS CREATED AFTER EFFECTIVE DATE

In general

The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law. With certain exceptions, there appears to be strong support for the principle, as embodies in the bill, of a copyright term consisting of the life of the author and 50 years after his death. In particular, the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision. The Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill.

Under the present law statutory copyright protection begins on the date of publication (or on the date of registration in unpublished form) and continues foe 28 years from that date; it may be renewed for a second 28 years, making a total potential term of 56 years in all cases.[1] The principal elements of this system—a definite number of years, computed from either publication or registration, with a renewal feature—have been a part of the U.S. copyright law since the first statute in 1790. The arguments for changing this system to one based on the life of the author can be summarized as follows:

1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright has expired.

2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years.

3. Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's

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[1] Under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, and 92-566, copyrights that were subsisting in their renewal term on Sept. 19, 1962, and that were scheduled to expire before Dec. 31, 1974, have been extended to that later date, in anticipation that general revision legislation extending their terms still further will be enacted by then.

expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

4. A system based on the life of the author would go a long way toward clearing up the confusion and uncertainty involved in the vague concept of "publication," and would provide a much simpler, clearer method for computing the term. The death of the author is a definite, determinable event, and it would be the only data that a potential user would have to worry about. All of a particular author's works, including those successively revised by him, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions. The bill answers the problems of determining when relatively obscure authors died, by establishing a registry of death dates and a system of presumptions.

5. One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright.

Under the life-plus-50 system the renewal device would be inappropriate and unnecessary.

6. Under the preemption provisions of section 301 and the single Federal system they would establish, authors will be giving up perpetual, unlimited exclusive common law rights in their unpublished works, including works that have been widely disseminated by means other than publication. A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights.

7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.

The need for a longer total term of copyright has been conclusively demonstrated. It is true that a major reason for the striking statistical increase in life expectancy since 1909 is the reduction in infant mortality, but this does not mean that the increase can be discounted. Although not nearly as great as the total increase in life expectancy, there has been a marked increase in longevity, and with medical discoveries and health programs for the elderly this trend shows every indication of continuing. If life expectancy in 1909, which was in the neighborhood of 56 years, offered a rough guide to the length of copyright protection, then life expectancy in the 1960's which is well over 70 years, should offer a similar guide; the Register's 1961 Report included statistics indicating that something between 70 and 76 years was then the average equivalent of life-plus-50 years. An author's copyright should extend beyond his lifetime, and judged by this standard the present term of 56 years is too short.

The arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity that would result from adoption of a life-plus-50 term, are also highly significant. The system has worked well in other countries, and on the whole it would appear to make computation of terms considerably simpler and easier. The registry of death dates and the system of presumptions established in section 302 would solve most of the problems in determining when an individual author died.

Aside from the Philippines, whose copyright statute was patterned after the United States Act of 1909, no country in the world has provisions on the duration of copyright like ours. Virtually every other copyright law in the world bases the term of protection for works by natural persons on the life of the author, and a substantial majority of these accord protection for 50 years after the author's death. This term is required for adherence to the Berne Convention. It is worth noting that the 1965 revision of the copyright law of the Federal Republic of Germany adopted a term of life plus 70 years.

A point that has concerned some educational groups arose from the possibility that, since a large majority (now about 85 percent) of all copyrighted works are not renewed, a life-plus-50 year term would tie up a substantial body of material that is probably of no commercial interest but that would be more readily available for scholarly use if free of copyright restrictions. A statistical study of renewal registrations made by the Copyright Office in 1966 supports the generalization that most material which is considered to be of continuing or potential commercial value is renewed. Of the remainder, a certain proportion is of practically no value to anyone, but there are a large number of unrenewed works that have scholarly value to historians, archivists, and specialists in a variety of fields. This consideration lay behind the proposals for retaining the renewal device or for limiting the term for unpublished or unregistered works.

It is true that today's ephemera represent tomorrow's social history, and that works of scholarly value, which are now falling into the public domain after 28 years, would be protected much longer under the bill. Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case in favor of a life-plus-50 system. Moreover, it is important to realize that the bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights. The advantages of a basic term of copyright enduring for the life of its author and for 50 years after his death outweigh any possible disadvantages.

Under subsection (a) of section 302, a work "created on or after" the effective date of the revised statute would be protected by statutory copyright "from its creation" and, with exceptions to be noted below, "endures for a term consisting of the life of the author and 50 years after his death."

Under this provision, as a general rule, the life-plus-50 term would apply equally to unpublished works, to works published during the author's lifetime, and to works published posthumously.

The definition of "created" in section 101, which will be discussed in more detail in connection with section 302(c) below, makes clear that "creation" for this purpose means the first time the work is fixed in a copy or phonorecord; up to that point the work is not "created," and is subject to common law protection, even though it may exist in someone's mind and may have been communicated to others in unfixed form.

Joint works

Since by definition a "joint work" has two or more authors, a statute basing the term of copyright on the life of the author must provide a special method of computing the term of "joint works." Under the system in effect in many foreign countries, the term of copyright is measured from the death of the last survivor of a group of joint authors, no matter how many there are. The bill adopts this system as the simplest and fairest of the alternative for dealing with the problem.

Anonymous works, pseudonymous works, and works made for hire

Computing the term from the author's death also requires special provisions to deal with cases where the authorship is not revealed or where the "author" is not an individual. Section 302(c) therefore provides a special term for anonymous works, pseudonymous works, and works made for hire: 75 years from publication or 100 years from creation, whichever is shorter. The definitions in section 101 make the status of anonymous and pseudonymous works depend on what is revealed on the copies or phonorecords of a work; a work is "anonymous" if "no natural person is identified as author," and is "pseudonymous" if "the author is identified under a fictitious name."

Section 302(c) provides that the 75- and 100-year term for an anonymous or pseudonymous work can be converted to the ordinary life-plus-50 term if "the identity of one or more of the authors * * * is revealed" in special records maintained for this purpose in the Copyright Office. The term in such cases would be "based on the life of the author or authors whose identity has been revealed." Instead of forcing a user to search through countless Copyright Office records to determine if an author's identity has been revealed, the bill sets up a special registry for the purpose, with requirements concerning the filing of identifying statements that parallel those of the following subsection (d) with respect to statements of the date of an author's death.

The alternative terms established in section 302(c)—75 years from publication or 100 years from creation, whichever expires first—are necessary to set a time limit on protection of unpublished material. For example, copyright in a work created in 1975 and published in 1985 would expire in 2060 (75 years from publication). A question arises as to when the copyright should expire if the work is never pub-

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lished. Both the Constitution and the underlying purposes of the bill require the establishment of an alternative term for unpublished work and the only practicable basis for this alternative is "creation." Under the bill a work created in 1980 but not published until after 2005 (or never published) would fall into the public domain in 2080 (100 years after creation).

The definition in section 101 provides that "creation" takes place when a work "is fixed in a copy or phonorecord for the first time." Although the concept of "creation" is inherently lacking in precision, its adoption in the bill would, for example, enable a scholar to use an unpublished manuscript written anonymously, pseudonymously, or for hire, if he determines on the basis of internal or external evidence that the manuscript is at least 100 years old. In the case of works written over a period of time or in successive revised versions, the definition provides that the portion of the work "that has been fixed at any particular time constitutes the work as of that time," and that, "where the work has been prepared in different versions, each version constitutes a separate work." Thus, a scholar or other user, in attempting to determine whether a particular work is in the public domain, needs to look no further than the particular version he wishes to use.

Although "publication" would no longer play the central role assigned to it under the present law, the concept would still have substantial significance under provisions throughout the bill, including those on Federal preemption and duration. Under the definition in section 101, a work is "published" if one or more copies or phonorecords embodying it are distributed to the public—that is, generally to persons under no explicit or implcit restrictions with respect to disclosure of its contents—without regard to the manner in which the copies or phonorecords changed hands. This definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form of dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work. On the other hand, the definition also makes clear that, when copies or phonorecords are offered to a group of wholesalers, broadcasters, motion picture theatres, etc., publication takes place if the purpose is "further distribution, public performance, or public display."

Although the periods of 75 or 100 years for anonymous and pseudonymous works and works made for hire seem to be longer than the equivalent term provided by foreign laws and the Berne Conventions, this difference is more apparent than real. In general, the terms in these special cases should and to approximate, on the average, the term of the life of the author plus 50 years established for other works. The 100-year maximum term for unpublished works, although much more limited than the perpetual term now available under common law in the United States and under statute in some foreign countries, is sufficient to guard against unjustified invasions of privacy and to fulfill our obligations under the Universal Copyright Convention.

Records and presumptions as to author's death

Subsections (d) and (e) of section 302 together furnish an answer to the practical problems of how to discover the death dates of obscure or unknown authors. Subsection (d) provides a procedure for recording statements that an author died, or that he was still living, on a particular date, and also requires the Register of Copyrights to maintain obtituary records on a current basis. Under subsection (e) anyone who, after a specified period, obtains certification from the Copyright Office that its records show nothing to indicate that the author is living or died less than 50 years before, is entitled to rely upon a presumption that the author has been dead for more than 50 years. The period specified in subsection (e)—75 years from publication or 100 years from creation—is purposely uniform with the special term provided in subsection (c).

SECTION 303. PREEXISTING WORKS UNDER COMMON LAW PROTECTION

Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every "original work of authorship" fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence.

Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. In general, the substituted time limits are those applicable to works created after the effective date of the law; for example, an unpublished work written in 1945 whose author dies in 1980 would be protected under the statute from the effective date through 2030 (50 years after the author's death).

A special problem under this provision is what to do with works whose ordinary statutory terms will have expired or will be nearing expiration on the effective date. The committee believes that a provision taking away subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a "reasonable period" for this purpose. Section 303 provides that under no circumstances would copyright protection expire before December 31, 1995, and also attempts to encourage publication by providing 25 years more protection (through 2020) if the work were published before the end of 1995.

SECTION 304. DURATION OF SUBSISTING COPYRIGHTS

It has been estimated that when the new law goes into effect there will be at least 6.6 million copyrights already subsisting: approximately 6 million still in their first term and 600,000 that have been renewed. The arguments in favor of lengthening the duration of copyright apply to subsisting as well as future copyrights, and that the bill's basic approach of increasing the present 56-year term to 75 years in the case of copyrights subsisting in both their first and their renewal terms is the simplest and fairest solution of the problem.

Copyrights in their first term

Subsection (a) of section 304 reenacts and preserves the renewal provision, now in section 24 of the statute, for all of the works presently in their first 28-year term. A great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut off or alter these interests. Renewal registration will be required during the 28th year of the copyright but the length of the renewal term will be increased from 28 to 47 years.

Copyrights in their renewal term

Renewed copyrights that are subsisting in their second term at any time during the period between December 31, 1973, and December 31, 1974, inclusive, would be extended under section 304(b) to run for a total of 75 years. This provision would add another 19 years to the duration of any renewed copyright whose second term started during the 28 years immediately preceding the effective date of the act (January 1, 1975). In addition, it would extend by varying lesser amounts the duration of renewal copyrights already extended under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170 and 92-566, all of which would otherwise expire on December 31, 1974. The subsection would also extend the duration of renewal copyrights whose second 28-year term is scheduled to expire during 1974. In none of these cases, however, would the total term of copyright for the work be longer than 75 years.

Subsection (b) also covers the special situation of a subsisting first-term copyright that becomes eligible for renewal registration during the year before the act comes into effect. If a renewal registration is not made before the effective date, the case is governed by the provisions of section 304(a). If a renewal registration is made during the year before the new law takes effect, however, the copyright would be treated as if it were already subsisting in its second term and would be extended to the full period of 75 years without the need for further renewal.

Termination of grants covering extended term

An issue underlying the 19-year extension of renewal terms under both subsections (a) and (b) of section 304 is whether, in a case where their rights have already been transferred, the author or his dependents should be given a chance to benefit from the extended term. The arguments for granting a right of termination are even more persuasive under section 304 than they are under section 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.

Subsection (c) of section 304 is a close but not exact counterpart of section 203. In the case of either a first-term or renewal copyright already subsisting when the new statute becomes effective, any grant of rights covering the renewal copyright in the work, executed before the effective date, may be terminated under conditions and limitations similar to those provided in section 203. Except for transfers and licenses covering renewal copyrights already extended under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, and

92-566 which would become subject to termination immediately upon the coming into effect of the revised law, the 5-year period during which termination could be made effective would start 56 years after copyright was originally secured.

The bill distinguishes between the persons who can terminate a grant under section 203 and those entitled to terminate a grant covering an extended term under section 304. Instead of being limited to transfers and licenses executed by the author, the right of termination under section 304(c) also extends to grants executed by those beneficiaries of the author who can claim renewal under the present law: his widow, children, executors, or next of kin.

There is good reason for this difference. Under section 203, an author's widow and children are given rights of termination if the author is dead, but these rights apply only to grants by the author, and any effort by a widow or child to transfer contingent future interests under a termination would be ineffective. In contrast, under the present renewal provisions, any statutory beneficiary of the author can make a valid transfer or license of future renewal rights, which is completely binding if the author is dead and the person who executed the grant turns out to be the proper renewal claimant. Because of this, a great many contingent transfers of future renewal rights have been obtained from widows, children, and next of kin, and a substantial number of these will be binding. After the present 28-year renewal period has ended, a statutory beneficiary who has signed a disadvantageous grant of this sort should have the opportunity to reclaim the extended term.

As explained above in connection with section 203, the bill adopts the principle that, where a transfer or license by the author is involved, termination may be effected by a per stirpes majority of those entitled to terminate, and this principle also applies to the ownership of rights under a termination and to the making of further grants of reverted rights. In general, this principle has also been adopted with respect to the termination of rights under an extended renewal copyright in section 304, but with several differences made necessary by the differences between the legal status of transfers and licenses made after the effective date of the new law (governed by sec. 203) and that of grants of renewal rights made earlier and governed by section 304(c). The following are the most important distinctions between the termination rights under the two sections:

1. *Joint authorship.*—Under section 304, a grant of renewal rights executed by joint authors during the first term of copyright would be effective only as to those who were living at the time of renewal; where any of them are dead, their statutory beneficiaries are entitled to claim the renewal independently as a new estate. It would therefore be inappropriate to impose a requirement of majority action with respect to transfers executed by two or more joint authors.

2. *Grants not executed by author.*—Section 304(c) adopts the majority principle underlying the amendments of section 203 with respect to the termination rights of a dead author's widow and children. There is much less reason, as a matter of policy, to apply this principle in the case of transfers and licenses of renewal rights executed under the present law by the author's widow, children, executors, or next of kin, and the practical arguments against doing so are conclusive. It is not clear how the shares of a class of renewal beneficiaries

are to be divided under the existing law, and greater difficulties would be presented if any attempt were made to apply the majority principle to further beneficiaries in cases where one or more of the renewal beneficiaries are dead. Therefore, where the grant was executed by a person or persons other than the author, termination can be effected only by the unanimous action of the survivors of those who executed it.

3. *Further grants.*—The reasons against adopting a principle of majority action with respect to the right to terminate grants by joint authors and grants not executed by the author apply equally with respect to the right to make further grants under section 304(c). The requirement for majority action in clause (6)(C) is therefore confined to cases where the rights under a grant by the author have reverted to his widow, children, or both. Where the extended term reverts to joint authors or to a class of renewal beneficiaries who have joined in executing a grant, their rights would be governed by the general rules of tenancy in common; each coowner would have an independent right to sell his share, or to use or license the work subject to an accounting.

SECTION 305. YEAR END EXPIRATION OF TERMS

Under section 305, which has its counterpart in the laws of most foreign countries, the term of copyright protection for a work extends through December 31 of the year in which the term would otherwise have expired. This will make the duration of copyright much easier to compute, since it will be enough to determine the year, rather than the exact date, of the event from which the term is based.

Section 305 applies only to "terms of copyright provided by sections 302 through 304," which are the sections dealing with duration of copyright. It therefore has no effect on the other time periods specified in the bill; and, since they do not involve "terms of copyright," the periods provided in section 304(c) with respect to termination of grants are not affected by section 305.

The terminal date section would change the duration of subsisting copyrights under section 304 by extending the total terms of protection under subsections (a) and (b) to the end of the 75th year from the date copyright was secured. A copyright subsisting in its first term on the effective date of the act would run through December 31 of the 28th year and would then expire unless renewed. Since all copyright terms under the bill expire on December 31, and since section 304(a) requires that renewal be made "within one year prior to the expiration of the original term of copyright," the period for renewal registration in all cases will run from December 31 through December 31.

A special situation arises with respect to subsisting copyrights whose first 28-year term expires during the first year after the act comes into effect. As already explained in connection with section 304(b), if a renewal registration for a copyright of this sort is made before the effective date, the total term is extended to 75 years without the need for a further renewal registration. But, if renewal has not yet been made when the act becomes effective, the period for renewal registration may in some cases be extended. If as the bill provides, the act becomes effective on January 1, 1975, a copyright that was originally secured on September 1, 1947, could have been renewed by virtue

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of the present statute between September 1, 1974, and December 31, 1974; if not, it can still be renewed under section 304(a) of the new act between January 1, 1975, and December 31, 1975.

SECTION 401. NOTICE ON VISUALLY PERCEPTIBLE COPIES

A requirement that the public be given formal notice of every work in which copyright is claimed was a part of the first U.S. copyright statute enacted in 1790, and since 1802 our copyright laws have always provided that the published copies of copyrighted works must bear a specified notice as a condition of protection. Under the present law the copyright notice requirement serves four principal functions:

(1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;

(2) It informs the public as to whether a particular work is copyrighted;

(3) It identifies the copyright owner;

(4) It shows the date of publication.

Ranged against these values of a notice requirement are its burdens and unfairness to copyright owners. One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice. It has been contended that the disadvantages of the notice requirement outweight its values and that it should therefore be eliminated or substantially liberalized.

The fundamental principle underlying the notice provisions of the bill is that the copyright notice has real values which should be preserved, and that this should be done by inducing use of notice without causing outright forfeiture for errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of copyright notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after the publication. Errors in the name or date in the notice could be corrected without forfeiture of copyright.

Sections 401 and 402 set out the basic notice requirements of the bill, the former dealing with "copies from which the work can be visually perceived," and the latter covering "phonorecords" of a "sound recording." The notice requirements established by these parallel provisions apply only when copies or phonorecords of the work are "publicly distributed." No copyright notice would be required in connection with the public display of a copy by an means, including projectors, television, or cathode ray tubes connected with information storage and retreval systems, or in connection with the public performance of a work by means of copies or phonorecords, whether in the presence of an audience or through television, radio, computer transmissions, or any other process.

It should be noted that, under the definition of "publication" in section 101, there would no longer be any basis for holding, as a few court decisions have done in the past, that the public display of a work of art under some conditions (e.g., without restriction against its reproduction) would constitute publication of the work. And, as

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indicated above, the public display of a work of art would not require that a copyright notice be placed on the copy displayed.

Subsections (a) of both section 401 and section 402 require that a notice be used whenever the work "is published in the United States or elsewhere by authority of the copyright owner." The phrase "or elsewhere," which does not appear in the present law, makes the notice requirements applicable to copies or phonorecords distributed to the public anywhere in the world, regardless of where and when the work was first published. The values of notice are fully applicable to foreign editions of works copyrighted in the United States, especially with the increased flow of intellectual materials across national boundaries, and the gains in the use of notice on editions published abroad under the Universal Copyright Convention should not be wiped out. The consequences of omissions or mistakes with respect to the notice are far less serious under the bill than under the present law, and section 405(a) makes doubly clear that a copyright owner may guard himself against errors or omissions by others if he makes use of the prescribed notice an express condition of his publishing licenses.

Subsection (b) of section 401, which sets out the form of notice, to appear on visually perceptible copies, retains the basic elements of the notice under the present law: the word "Copyright," the abbreviation "Copr.," or the symbol "©"; the year of first publication; and the name of the copyright owner. The year of publication, which is still significant in computing the term and determining the status of a work, is required for all categories of copyrightable works, but clause (2) of subsection (b) makes clear that, in the case of a derivative work or compilation, it is not necessary to list the dates of publication of all preexisting material incorporated in the work. Clause (3) establishes that a recognizable abbreviation or a generally known alternative designation may be used instead of the full name of the copyright owner.

By providing simply that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright, subsection (c) follows the flexible approach of the Universal Copyright Convention. The further provision empowering the Register of Copyrights to set forth in his regulations a list of examples of "specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement" will offer substantial guidance and avoid a good deal of uncertainty. A notice placed or affixed in accordance with the regulations would clearly meet the requirements but, since the Register's specifications are not to "be considered exhaustive," a notice placed or affixed in some other way might also comply with the law if it were found to "give reasonable notice" of the copyright claim.

SECTION 402. NOTICE ON PHONORECORDS OF SOUND RECORDINGS

A special notice requirement, applicable only to the newly copyrightable subject matter of sound recordings, is established by section 402. Since the bill would protect sound recordings as separate works, independent of protection for any literary or musical works embodied in them, there would be a likelihood of confusion if the same notice requirements applied to sound recordings and to the works they incorporate. Section 402 thus sets forth requirements for a notice to appear on the "phonorecords" of "sound recordings" that are different from the notice requirements established by section 401 for the "copies" of all other types of copyrightable works. Since "phonorecords" are not "copies," there is no need to place a section 401 notice on "phonorecords" to protect the literary or musical works embodied in the records.

In general, the form of the notice specified by section 402(b) consists of: the symbol "Ⓟ"; the year of first publication of the sound recording; and the name of the copyright owner or an admissible variant. Where the record producer's name appears on the record label, album, sleeve, jacket, or other container, it will be considered a part of the notice if no other name appears in conjunction with it. Under subsection (c), the notice for a copyrighted sound recording may be affixed to the surface, label, or container of the phonorecord "in such manner and location as to give reasonable notice of the claim of copyright."

There are at least three reasons for prescribing use of the symbol "Ⓟ" rather than "©" in the notice to appear on phonorecords of sound recordings. Aside from the need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it, there is also a necessity for distinguishing between copyright claims in the sound recording and in the printed text or art work appearing on the record label, album cover, liner notes, et cetera. The symbol "Ⓟ" has also been adopted as the international symbol for the protection of sound recordings by the "Convention for the Protection of Producers of Phonograms" (the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done at Geneva October 29, 1971). The United States ratified the convention on November 9, 1973.

SECTION 403. NOTICE FOR PUBLICATIONS INCORPORATING UNITED STATES WORKS

Section 403 is aimed at a publishing practice that, while technically justified under the present law, has been the object of considerable criticism. In cases where a Government work is published or republished commercially, it has frequently been the practice to add some "new matter" in the form of an introduction, editing, illustrations, etc., and to include a general copyright notice in the name of the commercial publisher. This in no way suggests to the public that the bulk of the work is uncopyrightable and therefore free for use.

To make the notice meaningful rather than misleading, section 403 requires that, when the copies or phonorecords consist "preponderantly of one or more works of the United States Government," the copyright notice (if any) identify those parts of the work in which copyright is claimed. A failure to meet this requirement would be treated as an omission of the notice, subject to the provisions of section 405.

SECTION 404. NOTICE FOR CONTRIBUTIONS TO COLLECTIVE WORKS

In conjunction with the provisions of section 201(c), section 404 deals with a troublesome problem under the present law: the notice requirements applicable to contributions published in periodicals and other collective works. The basic approach of the section is threefold:

(1) To permit but not require a separate contribution to bear its own notice;

(2) To make a single notice, covering the collective work as a whole, sufficient to satisfy the notice requirement for the separate contributions it contains, even if they have been previously published or their ownership is different; and

(3) To protect the interests of an innocent infringer of copyright in a contribution that does not bear its own notice, who has dealt in good faith with the person named in the notice covering the collective work as a whole.

As a general rule, under this section, the rights in an individual contribution to a collective work would not be affected by the lack of a separate copyright notice, as long as the collective work as a whole bears a notice. One exception to this rule would apply to "advertisements inserted on behalf of persons other than the owner of copyright in the collective work." Collective works, notably newspapers and magazines, are major advertising media, and it is common for the same advertisement to be published in a number of different periodicals. The general copyright notice in a particular issue would not ordinarily protect the advertisements inserted in it, and relatively little advertising matter today is published with a separate copyright notice. The exception in section 404(a), under which separate notices would be required for most advertisements published in collective works, would impose no undue burdens on copyright owners and is justified by the special circumstances.

Under section 404(b) a separate contribution that does not bear its own notice, and that is published in a collective work with a general notice containing the name of someone other than the copyright owner of the contribution, is treated as if it has been published with the wrong name in the notice. The case is governed by section 406(a), which means that an innocent infringer who in good faith took a license from the person named in the general notice would be shielded from liability to some extent.

SECTION 405. OMISSION OF COPYRIGHT NOTICE

Effect of omission on copyright protection

The provisions of section 405(a) make clear that the notice requirements of sections 401, 402, and 403 are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. Under the proposed law a work published without any copyright notice will still be subject to statutory protection for at least 5 years, whether the omission was partial or total, unintentional or deliberate.

Under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely.

Subsection (a) of section 405 provides that omission of notice, whether intentional or unintentional, does not invalidate the copyright if either of two conditions is met:

(1) if "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or

(2) if registration for the work has already been made, or is made within 5 years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.

Thus, if notice is omitted from more than a "relatively small number" of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within 5 years.

Section 405(a) takes the middle-ground approach in an effort to encourage use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Clause (1) provides that, as long as the omission is from "no more than a relatively small number of copies or phonorecords," there is no effect upon the copyright owner's rights except in the case of an innocent infringement covered by section 405(b); there is no need for registration or for efforts to correct the error if this clause is applicable. The phrase "relatively small number" is intended to be less restrictive than the phrase "a particular copy or copies" now in section 21 of the present law.

Under clause (2) of subsection (a), the first condition for curing an omission from a larger number of copies is that registration be made before the end of 5 years from the defective publication. This registration may have been made before the omission took place or before the work had been published in any form and, since the reasons for the omission have no bearing on the validity of copyright, there would be no need for the application to refer to them. Some time limit for registration is essential and the 5-year period is reasonable and consistent with the period provided in section 410(c).

The second condition established by clause (2) is that the copyright owner make a "reasonable effort," after discovering the error, to add the notice to copies or phonrecords distributed thereafter. This condition is specifically limited to copies or phonorecords publicly distributed in the United States, since it would be burdensome and impractical to require an American copyright owner to police the activities of foreign licensees in this situation.

The basic notice requirements set forth in sections 401(a) and 402(a) are limited to cases where a work is published "by authority of the copyright owner" and, in prescribing the effect of omission of notice, section 405(a) refers only to omission "from copies or phonorecords publicly distributed by authority of the copyright owner." The intention behind this language is that, where the copyright owner authorized publication of the work, the notice requirements would not be met if copies or phonorecords are publicly distributed without a notice, even is he expected a notice to be used. However, if the copyright owner authorized publication only on the express condition that all copies or phonorecords bear a prescribed notice, the provisions of sections 401 or 402 and of section 405 would not apply since the publication itself would not be authorized. This principle is stated directly in section 405(a)(3).

Effect of omission on innocent infringers

In addition to the possibility that copyright protection will be forfeited under section 405(a)(2) if the notice is omitted, a second major inducement to use of the notice is found in subsection (b) of section 405. That provision, which limits the rights of a copyright owner against innocent infringers under certain circumstances, would be applicable whether the notice has been omitted from a large number or from a "relatively small number" of copies. The general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.

Under section 405(b) an innocent infringer who acts "in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted", and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to "any infringing acts committed before receiving actual notice" of registration. Thus, where the infringement is completed before actual notice has been served—as would be the usual case with respect to relatively minor infringements by teachers, librarians, journalists, and the like—liability, if any, would be limited to the profits the infringer realized from his act. On the other hand, where the infringing enterprise is one running over a period of time, the copyright owner would be able to seek an injunction against continuation of the infringement, and to obtain full monetary recovery for all infringing acts committed after he had served notice of registration. Persons who undertake major enterprises of this sort should check the Copyright Office registration records before starting, even where copies have been published without notice.

The purpose of the second sentence of subsection (b) of the present bill is to give the courts broad discretion to balance the equities within the framework of section 405. Where an infringer made profits from infringing acts committed innocently before receiving notice from the copyright owner, the court may allow or withhold their recovery in light of the circumstances. The court may enjoin an infringement or may permit its continuation on condition that the copyright owner be paid a reasonable license fee.

Removal of notice by others

Subsection (c) of section 405 involves the situation arising when, following an authorized publication with notice, someone further down the chain of commerce removes, destroys, or obliterates the notice. The courts dealing with this problem under the present law, especially in connection with copyright notices on the selvage of textile fabrics, have generally upheld the validity of a notice that was securely attached to the copies when they left the control of the copyright owner, even though removal of the notice at some later stage was likely. This conclusion is incorporated in subsection (c).

SECTION 406. ERROR WITH RESPECT TO NAME OR DATE IN NOTICE

In addition to cases where notice has been omitted entirely, it is common under the present law for a copyright notice to be fatally defective because the name or date has been omitted or wrongly stated.

Section 406 is intended to avoid technical forfeitures in these cases, while at the same time inducing use of the correct name and date and protecting users who rely on erroneous information.

Error in name

Section 406(a) begins with a statement that the use of the wrong name in the notice will not affect the validity or ownership of the copyright, and then deals with situations where someone acting innocently and in good faith infringes a copyright by relying on a purported transfer or license from the person erroneously named in the notice. In such a case the innocent infringer is given a complete defense unless a search of the Copyright Office records would have shown that the owner was someone other than the person named in the notice. Use of the wrong name in the notice is no defense if, at the time infringement was begun, registration had been made in the name of the true owner, or if "a document executed by the person named in the notice and showing the ownership of the copyright had been recorded."

The situation dealt with in section 406 (a) presupposes a contractual relation between the copyright owner and the person named in the notice. The copies or phonorecords bearing the defective notice have been "distributed by authority of the copyright owner" and, unless the publication can be considered unauthorized because of breach of an express condition in the contract or other reasons, the owner must be presumed to have acquiesced in the use of the wrong name. If the person named in the notice grants a license for use of the work in good faith or under a misapprehension, he should not be liable as a copyright infringer, but the last sentence of section 406(a) would make him liable to account to the copyright owner for all of his gross receipts, subject to deduction of any costs he can justify.

Error in date

The familiar problems of antedated and postdated notices are dealt with in subsection (b) of section 406. In the case of an antedated notice, where the year in the notice is earlier than the year of first publication, the bill adopts the established judicial principle that any statutory term measured from the year of publication will be computed from the year given in the notice. This provision would apply not only to the copyright terms for anonymous works, pseudonymous works, and works made for hire under section 302(c), but also to the presumptive periods set forth in section 302(e).

As for postdated notices, subsection (b) provides that, where the year in the notice is more than 1 year later than the year of first publication the case is treated as if the notice had been omitted and is governed by section 405. Notices postdated by 1 year are quite common on works published near the end of a year, and it would be unnecessarily strict to equate cases of that sort with works published without notice of any sort.

Omission of name or date

Section 406(c) provides that, if the copies or phonorecords "contain no name or no date that could reasonably be considered a part of the notice," the result is the same as if the notice had been omitted entirely, and section 405 controls. Unlike the present law, the bill contains no provision requiring the elements of the copyright notice to "accompany" each other, and under section 406(c) a name or date that could reasonably be read with the other elements may satisfy the requirements even if somewhat separated from them. Direct contiguity or juxtaposition of the elements is no longer necessary; but if the elements are too widely separated for their relation to be apparent, or if uncertainty is created by the presence of other names or dates, the case would have to be treated as if the name or date, and hence the notice itself had been omitted altogether.

SECTION 407. DEPOSIT FOR THE LIBRARY OF CONGRESS

The provisions of section 407 through 411 of the bill mark another departure from the present law. Under the 1909 statute, deposit of copies for the collections of the Library of Congress and deposit of copies for purposes of copyright registration have been treated as the same thing. The bill's basic approach is to regard deposit and registration as separate though closely related: deposit of copies or phonorecords for the Library of Congress is mandatory, but exceptions can be made for material the Library neither needs nor wants; copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement. Deposit for the Library of Congress can be, and in the bulk of cases undoubtedly will be, combined with copyright registration.

The basic requirement of the deposit provision, section 407, is that within 3 months after a work has been published with notice of copyright in the United States, the "owner of copyright or of the exclusive right of publication" must deposit two copies or phonorecords of the work in the Copyright Office. The Register of Copyrights is authorized to exempt any category of material from the deposit requirements. Where the category is not exempted and deposit is not made, the Register may demand it; failure to comply would be penalized by a fine.

Under the present law deposit for the Library of Congress must be combined with copyright registration, and failure to comply with a formal demand for deposit and registration results in complete loss of copyright. Under section 407 of the bill, the deposit requirements can be satisfied without ever making registration, and subsection (a) makes clear that deposit "is not a condition of copyright protection." A realistic fine, coupled with the increased inducements for voluntary registration and deposits under other sections of the bill, seems likely to produce a more effective deposit system than the present one. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.

Although the deposit requirements are limited to works "published with notice of copyright in the United States," they would become applicable as soon as a work first published abroad is published in this country through the distribution of copies or phonorecords that are either imported or are part of an American edition. With respect to all types of works other than sound recordings, the basic obligation is to deposit "two complete copies of the best edition"; the term "best edition," as defined in section 101, makes clear that the Library of Congress is entitled to receive copies or phonorecords from the edition it believes best suits its needs, regardless of the quantity or quality of other U.S. editions that may also have been published before the time of deposit. Once the deposit requirements for a particular work have been satisfied under section 407, however, the Library cannot claim deposit of future editions unless they represent newly copyrightable works under section 103.

The deposit requirement for sound recordings includes "two complete phonorecords of the best edition" and any other visually perceptible material published with the phonorecords. The reference here is to the text or pictorial matter appearing on record sleeves and album covers or embodied in separate leaflets or booklets included in a sleeve, album, or other container. The required deposit in the case of a sound recording would extend to the entire "package" and not just to the disk, tape, or other phonorecord included as part of it.

Deposits under section 407, although made in the Copyright Office, are "for the use or disposition of the Library of Congress." Thus, the fundamental criteria governing regulations issued under section 407(c), which allows exemptions from the deposit requirements for certain categories of works, would be the needs and wants of the Library. The purpose of this provision is to make the deposit requirements as flexible as possible, so that there will be no obligation to make deposit where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases. The regulations, in establishing special categories for these purposes would necessarily balance the value of the copies or phonorecords to the collections of the Library of Congress against the burdens and costs to the copyright owner of providing them.

If, within 3 months after the Register of Copyrights has made a formal demand for deposit in accordance with section 407(d), the person on whom the demand was made has not complied, he becomes liable to a fine of up to $250 for each work, plus the "total retail price of the copies or phonorecords demanded." If no retail price has been fixed, clause (2) of subsection (d) establishes the additional amount as "the reasonable cost to the Library of Congress of acquiring them." Thus, where the copies or phonorecords are not available for sale through normal trade channels—as would be true of many motion picture firms, video tapes, and computer tapes, for example—the item of cost to be included in the fine would be equal to the basic expense of duplicating the copies or phonorecords plus a reasonable amount representing what it would have cost the Library to obtain them under its normal acquisitions procedures, if they had been obtainable.

SECTION 408. COPYRIGHT REGISTRATION IN GENERAL

Permissive registration

Under section 408(a), registration of a claim to copyright in any work, whether published or unpublished, can be made voluntarily by "the owner of copyright or of any exclusive right in the work" at any time during the copyright term. The claim may be registered in the Copyright Office by depositing the copies, phonorecords, or other material specified by subsections (b) and (c), together with an application and fee. Except where, under section 405(a), registration is made to preserve a copyright that would otherwise be invalidated because of omission of the notice, registration is not a condition of copyright protection.

Deposit for purpose of copyright registration

In general, and subject to various exceptions, the material to be deposited for copyright registration consists of one complete copy or phonorecord of an unpublished work, and two complete copies or phonorecords of the best edition in the case of a published work. Section 408(b) provides special deposit requirements in the case of a work first published abroad ("one complete copy or phonorecord as so published") and in the case of a contribution to a collective work ("one complete copy or phonorecord of the best edition of the collective work"). As a general rule the deposit of more than a tear sheet or similar fraction of a collective work is needed to identify the contribution properly and to show the form in which it was published. Where appropriate as in the case of collective works such as multivolume encyclopedias, multipart newspaper editions, and works that are rare or out of print, the regulations issued by the Register under section 408(c) can be expected to make exceptions or special provisions.

With respect to works published in the United States, a single deposit could be used to satisfy the deposit requirements of section 407 and the registration requirements of section 408, if the application and fee for registration are submitted at the same time and are accompanied by "any additional identifying material" required by regulations. To serve this dual purpose the deposit and registration would have to be made simultaneously; if a deposit under section 407 had already been made, an additional deposit would be required under section 408. In addition, since deposit for the Library of Congress and registration of a claim to copyright serve essentially different functions, section 408(b) authorizes the Register of Copyrights is issue regulations under which deposit of additional material, needed for identification of the work in which copyright is claimed, could be required in certain cases.

Administrative classification

It is important that the statutory provisions setting forth the subject matter of copyright be kept entirely separate from any classification of copyrightable works for practical administrative purposes. Section 408(c) thus leaves it to the Register of Copyrights to specify "the administrative classes into which works are to be placed for purposes of deposit and registration," and makes clear that this administrative classification "has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title."

Optional deposit

Consistent with the principle of administrative flexibility underlying all of the deposit and registration provisions, subsection (c) of section 408 also gives the Register latitude in adjusting the type of material deposited to the needs of the registration system. He is authorized to issue regulations specifying "the nature of the copies or phonorecords to be deposited in the various classes" and, for particular classes, to require or permit deposit of identifying material rather than copies or phonorecords, deposit of one copy or phonorecord rather than two, or, in the case of a group of related works, a single rather than a number of separate registrations. Under this provision the Register could, where appropriate, permit deposit of phonorecords rather than notated copies of musical compositions, allow or require deposit of print-outs of computer programs under certain circumstances, or permit deposit of one volume of an encyclopedia for purposes of registration of a single contribution.

Where the copies or phonorecords are bulky, unwieldly, easily broken, or otherwise impractical to file and retain as records identifying the work registered, the Register would be able to require or permit the substitute deposit of material that would better serve the purpose of identification. Cases of this sort might include, for example, billboard posters, toys and dolls, ceramics and glassware, costume jewelery, and a wide range of three-dimensional objects embodying copyrighted material. The Register's authority would also extend to rare or extremely valuable copies which would be burdensome or impossible to deposit. Deposit of one copy or phonorecord rather than two would probably be justifiable in the case of most motion pictures, and in any case where the Library of Congress has no need for the deposit and its only purpose is identification.

The provision empowering the Register to allow a number of related works to be registered together as a group represents a needed and important liberalization of the law now in effect. At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems and has resulted in unnecessary burdens and expenses on authors and other copyright owners. In a number of cases the technical necessity for separate applications and fees has caused copyright owners to forgo copyright altogether. Examples of cases where these undesirable and unnecessary results could be avoided by allowing a single registration include the various editions or issues of a daily newspaper, a work published in serial installments, a group of related jewelry designs, a group of photographs by one photographer, a series of greeting cards related to each other in some way, or a group of poems by a single author.

Corrections and amplifications

Another unsatisfactory aspect of the present law is the lack of any provision for correcting or amplifying the information given in a completed registration. Subsection (d) of section 408 would remedy this by authorizing the Register to establish "formal procedures for the filing of an application for supplementary registration," in order to correct an error or amplify the information in a copyright registration. The "error" to be corrected under subsection (d) is an error by the applicant that the Copyright Office could not have been expected to note during its examination of the claim; where the error in a registration is the result of the Copyright Office's own mistake or oversight, the Office can make the correction on its own initiative and without recourse to the "supplementary registration" procedure.

Under subsection (d), a supplementary registration is subject to payment of a separate fee and would be maintained as an independent record, separate and apart from the record of the earlier registration it is intended to supplement. However, it would be required to identify clearly "the registration to be corrected or amplified" so that the two registrations could be tied together by appropriate means in the Copyright Office records. The original registration would not be expunged or cancelled; as stated in the subsection: "The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration."

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Published edition of previously registered work

The present statute requires that, where a work is registered in unpublished form, it must be registered again when it is published, whether or not the published edition contains any new copyrightable material. Under the bill there would be no need to make a second registration for the published edition unless it contains sufficient added material to be considered a "derivative work" or "compilation" under section 103.

On the other hand, there will be a number of cases where the copyright owners, although not required to do so, would like to have registration made for his published edition, especially since he will still be obliged to deposit copies or phonorecords of it in the Copyright Office under section 407. From the point of view of the public there are advantages in allowing him to do so, since registration for the published edition will put on record the facts about the work in the form in which it is actually distributed to the public. Accordingly, section 408(e), which is intended to accomplish this result, makes an exception to the general rule against allowing more than one registration for the same work.

SECTION 409. APPLICATION FOR REGISTRATION

The various clauses of section 409, which specify the information to be included in an application for copyright registration, are intended to give the Register of Copyrights authority to elicit all of the information needed to examine the application and to make a meaningful record of registration. The list of enumerated items is not exhaustive; under the last clause of the section the application may also include "any other information regarded by the Register of Copyrights as bearing upon the preparation, or identification of the work or the existence, ownership, or duration of the copyright."

Among the enumerated items there are several that are not now included in the Copyright Office's application forms, but will become significant under the life-plus-50 term and other provisions of the bill. Clause (5), reflecting the increased importance of the interrelationship between registration of copyright claims and recordation of transfers of ownership, requires a statement of how a claimant who is not the author acquired ownership of the copyright. The catchall clause at the end of the section will enable the Register to obtain more specialized information, such as that bearing on whether the work contains material that is a "work of the United States Government." In the case of works subject to the manufacturing requirement, the application must also include information about the manufacture of the copies.

SECTION 410. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE

The first two subsections of section 410 set forth the two basic duties of the Register of Copyrights with respect to copyright registration: (1) to register the claim and issue a certificate if he determines that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met," and (2) to refuse registration and notify the applicant if he determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason."

Subsection (c) deals with the probative effect of a certificate of registration issued by the Register under subsection (a). Under its provisions, a certificate is required to be given prima facie weight in any judicial proceedings if the registration it covers was made "before or within five years after first publication of the work"; thereafter the court is given discretion to decide what evidentiary weight the certificate should be accorded. This 5-year period is based on a recognition that the longer the lapse of time between publication and registration the less likely to be reliable are the facts stated in the certificate.

Under section 410(c), a certificate is to "constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." The principle that a certificate represents prima facie evidence of copyright validity has been established in a long line of court decisions, and it is a sound one. It is true that, unlike a patent claim, a claim to copyright is not examined for basic validity before a certificate is issued. On the other hand, endowing a copyright claimant who has obtained a certificate with a rebuttable presumption of the validity of his copyright does not deprive the defendant in an infringement suit of any rights; it merely orders the burdens of proof. The plaintiff should not ordinarily be forced in the first instance to prove all of the multitude of facts that underlie the validity of his copyright unless the defendant, by effectively challenging them, shifts the burden to him to do so.

Section 410(d), which is in accord with the present practice of the Copyright Office, makes the effective date of registration the day when an application, deposit, and fee, "which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration," have all been received. Where the three necessary elements are received at different times, the date of receipt of the last of them is controlling, regardless of when the Copyright Office acts on the claim. The provision not only takes account of the inevitable timelag between receipt of the application and other material and the issuance of the certificate, but is also recognizes the possibility that a court might later find the Register wrong in refusing registration.

SECTION 411. REGISTRATION AS PREREQUISITE TO INFRINGEMENT SUIT

The first sentence of section 411(a) restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted. Under the bill, as under the law now in effect, a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration.

The second and third sentences of section 411(a) would alter the present law as interpreted in *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F. 2d 637 (2d Cir 1958). That case requires an applicant, who has sought registration and has been refused, to bring an action against the Register of Copyrghts to compel the issuance of a certificate, before he can bring suit against an infringer. Under section 411, a rejected claimant who has properly applied for registration may maintain an infringement sut if he serves notice of it on the Register of Copyrights. The Register is authorized, though not required, to enter the suit within 60 days; he would be a party on the issue of registrability only, and his failure to join the action would "not deprive the court of jurisdiction to determine that issue."

Section 411(b) is intended to deal with the special situation presented by works that are being transmitted "live" at the same time they are being fixed in tangible form for the first time. Under certain circumstances, where the infringer has been given advance notice, an injunction could be obtained to prevent the unauthorized use of the "live" transmission.

SECTION 412. REGISTRATION AS PREREQUISITE TO CERTAIN REMEDIES

The need for section 412 arises from two basic changes the bill will make in the present law:

(1) Copyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way.

(2) The great body of unpublished works now protected at common law would automatically be brought undercopyright and given statutory protection. The remedies for infringement presently available at common law should continue to apply to these works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim.

Under the general scheme of the bill, a copyright owner whose work has been infringed before registration would be entitled to the remedies ordinarily available in infringement cases: an injunction on terms the court considers fair, and his actual damages plus any applicable profits not used as a measure of damages. However, section 412 would deny any award of the special or "extraordinary" remedies of statutory damages or attorney's fees where infringement of copyright in an unpublished work began before registration or where, in the case of a published work, infringement commenced after publication and before registration (unless registration has been made within a grace period of 3 months after publication). These provisions would be applicable to works of foreign and domestic origin alike.

In providing that statutory damages and attorney's fees are not recoverable for infringement of unpublished, unregistered works, clause (1) of section 412 in no way narrows the remedies available under the present law. With respect to published works, clause (2) would generally deny an award of those two special remedies where infringement takes place before registration. As an exception, however, the clause provides a grace period of 3 months after publication during which registration can be made without loss of remedies; full remedies could be recovered for any infringement begun during the 3 months after publication if registration is made before that period has ended. This exception is needed to take care of newsworthy or suddenly popular works which may be infringed almost as soon as they are published, before the copyright owner has had a reasonable opportunity to register his claim.

SECTION 501. INFRINGEMENT OF COPYRIGHT

The bill, unlike the present law, contains a general statement of what constitutes infringement of copyright. Section 501(a) identifies a copyright infringer as someone who "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 117" of the bill, or who imports copies or phonorecords in violation of section 602. Under the latter section an unauthorized importation of copies or phonorecords acquired abroad is an infringement of the exclusive right of distribution under certain circumstances.

The principle of the divisibility of copyright ownership, established by section 201(d), carries with it the need in infringement actions to safeguard the rights of all copyright owners and to avoid a multiplicity of suits. Subsection (b) of section 501 enables the owner of a particular right to bring an infringement action in his own name alone, while at the same time insuring to the extent possible that the other owners whose rights may be affected are notified and given a chance to join the action.

The first sentence of subsection (b) empowers the "legal or beneficial owner of an exclusive right" to bring suit for "any infringement of that particular right committed while he is the owner of it." A "beneficial owner" for this purpose would include, for example, an author who had parted with his legal title to the copyright in exchange for percentage royalties based on sales or license fees.

The second and third sentences of section 501(b), which supplement the provisions of the Federal Rules of Civil Procedure, give the courts discretion to require the plaintiff to serve notice of his suit on "any person shown, by the records of the Copyright Officer or otherwise, to have or claim an interest in the copyright"; where a person's interest "is likely to be affected by a decision in the case" a court order requiring service of notice is mandatory. As under the Federal rules, the court has discretion to require joinder of "any person having or claiming an interest in the copyright"; but, if any such person wishes to become a party, the court must permit his intervention.

In addition to cases involving divisibility of ownership in the same version of a work, section 501(b) is intended to permit a court to permit or compel joinder of owners of rights in works upon which a derivative work is based.

For purposes of subsection (b), subsection (c) of Section 501 provides that a television broadcast station holding a copyright or other license to transmit or perform the same version of a work shall be regarded as a legal or beneficial owner if a cable television system makes a secondary transmission which is actionable as an act of infringement under Section 111 if the transmission occurs within the local service area of the television broadcast station.

SECTION 502. INJUNCTIONS

Section 502(a) reasserts the discretionary power of courts to grant injunctions and restraining orders, whether "preliminary," "temporary," "interlocutory," "permanent," or "final," to prevent or stop infringements of copyright. This power is made subject to the provisions of section 1498 of title 28, dealing with infringement actions against

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the United States. The latter reference in section 502(a) makes it clear that the bill would not permit the granting of an injunction against an infringement for which the Federal Government is liable under section 1498.

Under subsection (b), which is the counterpart of provisions in sections 112 and 113 of the present statute, a copyright owner who has obtained an injunction in one State will be able to enforce it against a defendant located anywhere else in the United States.

SECTION 503. IMPOUNDING AND DISPOSITION OF INFRINGING ARTICLES

The two subsections of section 503 deal respectively with the courts' power to impound allegedly infringing articles during the time an action is pending, and to order the destruction or other disposition of articles found to be infringing. In both cases the articles affected include "all copies or phonorecords" which are claimed or found "to have been made or used in violation of the copyright owner's exclusive rights," and also "all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies of phonorecords may be reproduced." The alternative phrase "made or used" in both subsections enables a court to deal as it sees fit with articles which, though reproduced and acquired lawfully, have been used for infringing purposes such as rentals, performances, and displays.

Articles may be impounded under subsection (a) "at any time while an action under this title is pending," thus permitting seizure of articles alleged to be infringing as soon as suit has been filed and without waiting for an injuction. The same subsection empowers the court to order impounding "on such terms as it may deem resonable." The present Supreme Court rules with respect to seizure and impounding were issued even though there is no specific provision authorizing them in the copyright statute, and there appears no need for including a special provision on the point in the bill.

Under section 101(d) of the present statute, articles found to be infringing may be ordered to be delivered up for destruction. Section 503(b) of the bill would make this provision more flexible by giving the court discretion to order "destruction or other reasonable disposition" of the articles found to be infringing. Thus, as part of its final judgment or decree, the court could order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice.

SECTION 504. DAMAGES AND PROFITS

In general

A cornerstone of the remedies sections and of the bill as a whole is section 504, the provision dealing with recovery of actual damages, profits, and statutory damages. The two basic aims of this section are reciprocal and correlative: (1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.

Subsection (a) lays the ground work for the more detailed provisions of the section by establishing the liability of a copyright infringer for either "the copyright owner's actual damages and any additional profits of the infringer," or statutory damages. Recovery of actual damages and profits under section 504(b) or of statutory damages under section 504(c) is alternative and for the copyright owner to elect: as under the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits if he chooses to rely on the provision for minimum statutory damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages with the range set out in subsection (c).

Actual damages and profits

In allowing the plaintiff to recover "the actual damages suffered by him as a result of the infringement," plus any of the infringer's profits "that are attributable to the infringement and are not taken into account in computing the actual damages," section 504(b) recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for his losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from his wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.

The language of the subsection makes clear that only those profits "attributable to the infringement" are recoverable; where some of the defendant's profits result from the infringement and other profits are caused by different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only "the infringer's gross revenue," and the defendant must prove not only "his deductible expenses" but also "the elements of profit attributable to factors other than the copyrighted work."

Statutory damages

Subsection (c) of section 504 makes clear that the plaintiff's election to recover statutory damages may take place at any time during the trial before the court has rendered its final judgment. The remainder of clause (1) of the subsection represents a statement of the general rules applicable to awards of statutory damages. Its principal provisions may be summarized as follows:

1. As a general rule, where the plaintiff elects to recover statutory damages, the court is obliged to award between $250 and $10,000. It can exercise discretion in awarding an amount within that range but, unless one of the exceptions provided by clause (2) is applicable, it cannot make an award of less than $250 or of more than $10,000 if the copyright owner has chosen recovery under section 504(c).

2. Although, as explained below, an award of minimum statutory damages may be multiplied if separate works and separately-

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liable infringers are involved in the suit, a single award in the $250 to $10,000 range is to be made "for all infringements involved in the action." A single infringer of a single work is liable for a single amount between $250 and $10,000, no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.

3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least $750 and may be awarded up to $30,000. Subsection (c)(1) makes clear, however, that, although they are regarded as independent works for other purposes, "all the parts of a compilation or derivative work constitute one work" for this purpose. Moreover, although the minimum and maximum amounts are to be multiplied where multiple "works" are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate "copyrights" in a single "work" infringed by one act of a defendant.

4. Where the infringements of one work were committed by a single infringer acting individually, a single award of statutory damages would be made. Similarly, where the work was infringed by two or more joint tort feasors, the bill would make them jointly and severally liable for an amount in the $250 to $10,000 range. However, where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate.

Clause (2) of section 504(c) provides for exceptional cases in which the maximum award of statutory damages could be raised from $10,000 to $50,000, and in which the minimum recovery could be reduced from $250 to $100. The basic principle underlying this provision is that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringer is innocent. The language of the clause makes clear not only that the burden of proving willfulness rests on the copyright owner and that of proving innocence rests on the infringer, but also that the court must make a finding of either willfulness or innocence in order to award the exceptional amounts.

The "innocent infringer" provision of section 504(c)(2) has been the subject of extensive discussion. The exception, which would allow reduction of minimum statutory damages to $100 where the infringer "was not aware and had no reason to believe that his acts constituted an infringement of copyright," is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement, and it offers adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to this type of infringement suit. On the other hand, by establishing a realistic floor for liability, the provision preserves its intended deterrent effect; and it would not allow a defendant to escape simply because the plaintiff failed to disprove his claim of innocence.

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In addition to the general "innocent infringer" provision clause (2) deals with the special situation of teachers, libraries, and archivists in nonprofit institutions who reproduce copyrighted material in the honest belief that what they are doing constitutes fair use. In cases of this sort it would be possible for the court to find that there had been infringement and still reduce the statutory minimum or waive it altogether. This exception applies only where the defendant proves "that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107." It reflects the special problems of educational and scholarly uses of copyrighted material discussed in connection with that section.

SECTIONS 505 THROUGH 508. MISCELLANEOUS PROVISIONS ON INFRINGEMENT AND REMEDIES

The remaining sections of chapter 5 of the bill, dealing with costs and attorney's fees, criminal offenses, the statute of limitations, and notification of copyright actions, do not require extended comment.

Under section 505 the awarding of costs and attorney's fees are left to the court's discretion, and the section also makes clear that neither costs nor attorney's fees can be awarded to or against "the United States or an officer thereof." Four types of criminal offenses actionable under the bill are listed in section 506: willful infringement for profit, fraudulent use of a copyright notice, fraudulent removal of notice, and false representation in connection with a copyright application. The maximum fine on conviction has been increased to $2,500 and in conformity with the general pattern of the Criminal Code (18 U.S.C.), no minimum fines have been provided. In addition to or instead of a fine, conviction for criminal infringement under section 506(a) can carry with it a sentence of imprisonment of up to 1 year; and, where the offense is repeated, the defendant may be fined up to $10,000 or imprisoned up to 3 years, or both.

Section 506(a) contains a special provision applying to any person who infringes willfully and for purposes of commercial advantage the copyright in a sound recording. For the first such offense a person shall be fined not more than $25,000 or imprisoned for not more than 3 years, or both. For any subsequent offense a person shall be fined not more than $50,000 or imprisoned not more than 7 years or both.

Section 507, which is substantially identical with section 115 of the present law, establishes a 3-year statute of limitations for both criminal proceedings and civil actions. The language of this section, which was adopted by the act of September 7, 1957 (71 Stat. 633), represents a reconciliation of views, and has therefore been left unaltered. Section 508, which corresponds to some extent with a provision in the patent law (35 U.S.C. sec. 290), is intended to establish a method for notifying the Copyright Office and the public of the filing and disposition of copyright cases. The clerks of the Federal courts are to notify the Copyright Office of the filing of any copyright actions and of their final disposition, and the Copyright Office is to make these notifications a part of its public records.

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SECTION 601. MANUFACTURING REQUIREMENT

The requirement in general

A chronic problem in efforts to revise the copyright statute for the past 75 years has been the need to reconcile the interests of the American printing industry with those of authors and other copyright owners. The scope and impact of the "manufacturing clause," which came into the copyright law as a compromise in 1891, have been gradually narrowed by successive amendments. The basis problem is still unresolved.

Under the present statute, with many exceptions and qualifications, a book or periodical in the English language must be manufactured in the United States in order to receive full copyright protection. Failure to comply with any of the complicated requirements can result in complete loss of protection. Today the main effects of the manufacturing requirements are on works by American authors.

The first and most important question here is whether the manufacturing requirement should be retained in the statute in any form. The Register of Copyrights, whose 1961 Report had recommended outright repeal, made clear that he still favors this result in principle; however, if economic factors have not changed sufficiently to permit dropping the requirement entirely, he urged that it be "substantially narrowed so that rights are not destroyed in situations where the book manufacturing industry has no real need of protection." Beginning in 1965, serious efforts at compromising the issue were made by various interests, and these appear to have been successful.

The principal arguments for elimination of the manufacturing requirement can be summarized as follows:

1. The manufacturing clause originated as a response to a historical situation that no longer exists. Its requirements have gradually been relaxed over the years, and the results of the 1954 amendment, which partially eliminated it, have borne out predictions of positive economic benefits for all concerned, including printers, printing trades union members, and the public.

2. The provision places unjustified burdens on the author, who is treated as a hostage. It hurts the author most where it benefits the manufacturer least: in cases where the author must publish abroad or not at all. It unfairly discriminates between American authors and other authors, and between authors of books and authors of other works.

3. The manufacturing clause violates the basic principle that an author's rights should not be dependent on the circumstances of manufacture. Complete repeal would substantially reduce friction with foreign authors and publishers, increase opportunities for American authors to have their works published, encourage international publishing ventures, and eliminate the tangle of procedural requirements now burdening authors, publishers, the Copyright Office, and the Bureau of Customs.

4. Studies prove that the economic fears of the printing industry and unions are unfounded. The vast bulk of American titles are completely manufactured in the United States, and U.S. ex-

ports of printed matter are much greater than imports. The American book manufacturing industry is healthy and growing, to the extent that it cannot keep pace with its orders. There are increasing advantages to domestic manufacture because of improved technology, and because of the delays, inconveniences, and other disadvantages of foreign manufacture. Even with repeal, foreign manufacturing would be confined to small editions and scholarly works, some of which could not be published otherwise.

The following were the principal arguments in favor of retaining some kind of manufacturing restriction.

1. The historical reasons for the manufacturing clause were valid originally and still are. It is unrealistic to speak of this as a "free trade" issue or of tariffs as offering any solution, since book tariffs have been minimal and are being removed entirely; the manufacturing requirement remains a reasonable and justifiable condition to the granting of a monopoly. There is no problem of international comity, since only works by American authors are affected by section 601. Foreign countries have many kinds of import barriers, currency controls, and similar restrictive devices comparable to a manufacturing requirement.
2. The differentials between U.S. and foreign wage rates in book production are extremely broad and are not diminishing; Congress should not create a condition whereby work can be done under the most degraded working conditions in the world, be given free entry, and thus exclude American manufacturers from the market. The manufacturing clause has been responsible for a strong and enduring industry. Repeal would destroy small businesses, bring chaos to the industry, and catch manufacturers, whose labor costs and break-even points are extremely high, in a cost-price squeeze at a time when expenditures for new equipment have reduced profits to a minimum.
3. The high ratio of exports to imports could change very quickly without a manufacturing requirement. Repeal would add to the balance-of-payments deficit since foreign publishers never manufacture here. The U.S. publishing industry has large investments abroad, and attacks on the manufacturing clause by foreign publishers show a keen anticipation for new business. The book publishers' arguments that repeal would have no real economic impact are contradicted by their arguments that the manufacturing requirement is stifling scholarship and crippling publishing; their own figures show a 250 percent rise in English-language book imports in 10 years.

On balance it appears that, although there is no justification on principle for a manufacturing requirement in the copyright statute, there may still be some economic justification for it. Section 601 represents a substantial liberalization that will remove many of the inequities of the present manufacturing requirement. The real issue that lies between section 601 and complete repeal is an economic one, and on purely economic grounds the possible dangers to the American printing industry in removing all restrictions on foreign manufacture outweigh the possible benefits repeal would bring to American authors and publishers.

The committee is aware that the concern on both sides is not so much with the present but with the future; and, because new machines and

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devices for reproducing copyrighted text matter are in a stage of rapid development, the future in this area is unpredictable. Outright repeal of the manufacturing requirement should be accomplished as soon as it can be shown convincingly that the effects on the U.S. printing industry as a whole would not be serious. Meanwhile the best approach lies in the compromise embodied in section 601 of the present bill.

Works subject to the manufacturing requirement

The scope of the manufacturing requirement, as set out in subsections (a) and (b) of section 601, is considerably more limited than that of present law. The requirements apply to "a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title," and would thus not extend to: dramatic, musical, pictorial, or graphic works; foreign-language works and bilingual or multilingual dictionaries; public domain material; or works consisting preponderantly of material that is not subject to the manufacturing requirement.

A work containing "nondramatic literary material that is in the English language and is protected under this title," and also containing dramatic, musical, pictorial, graphic, foreign-language, public domain, or other material that is not subject to the manufacturing requirement, or any combination of these, is not considered to consist "preponderantly" of the copyright-protected nondramatic English-language literary material unless such material exceeds the exempted material in importance. Thus, where the literary material in a work consists merely of a forward or preface, and captions, headings, or brief descriptions or explanations of pictorial, graphic or other non-literary material, the manufacturing requirement does not apply to the work in whole or in part. In such a case, the non-literary material clearly exceeds the literary material in importance, and the entire work is free of the manufacturing requirement.

On the other hand, if the copyright-protected non-dramatic English-language literary material in the work exceeds the other material in importance, then the manufacturing requirement applies. For example, a work containing pictorial, graphic, or other non-literary material is subject to the manufacturing requirement if the non-literary material merely illustrates a textual narrative or exposition, regardless of the relative amount of space occupied by each kind of material. In such a case, the narrative or exposition comprising the literary material plainly exceeds in importance the non-literary material in the work. However, even though such a work is subject to the manufacturing requirement, only the portions consisting of copyrighted nondramatic literary material in English are required to be manufactured in the United States or Canada. The illustrations may be manufactured elsewhere without affecting their copyright status.

Under section 601(b)(1) works by American nationals domiciled abroad for at least a year would be exempted. The manufacturing requirement would generally apply only to works by American authors domiciled here, and then only if none of the co-authors of the work is foreign.

In order to make clear the application of the foreign-author exemption to "works made for hire"—of which the employer or other person for whom the work was prepared is considered the "author" for copyright purposes—the committee adopted an amendment which provides that the exemption does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States, or a domestic corporation or enterprise.

The committee has adopted the proposal put forward by various segments of both the U.S. and the Canadian printing industries, recommending an exemption for copies manufactured in Canada. Since wage standards in Canada are substantially comparable to those in the United States, the arguments for equal treatment under the manufacturing clause are persuasive.

Limitations on importation and distribution of copies manufactured abroad

The basic purpose of section 601, like that of the present manufacturing clause, is to induce the manufacture of an edition in the United States if more than a certain limited number of copies are to be distributed in this country. Subsection (a) therefore provides in general that "the importation into or public distribution in the United States" of copies not complying with the manufacturing clause is prohibited. Subsection (b) then sets out the exceptions to this prohibition, and clause (2) of that subsection fixes the limit at 2,000 copies.

Additional exceptions to the copies affected by the manufacturing requirements are set out in clauses (3), (4), (5), and (6) of subsection (b). Clause (3) permits importation of copies for governmental use, other than in schools, by the United States or by "any State or political subdivision of a State." Clause (4) allows importation for personal use of "no more than one copy of any one work at any one time," and also exempts copies in the baggage of persons arriving from abroad and copies intended for the library collection of nonprofit scholarly, educational, or religious organizations. Braille copies are completely exempted under clause (5), and clause (6) permits the public distribution in the United States of copies allowed entry by the other clauses of that subsection.

What constitutes "manufacture in the United States"

A most difficult and, to some at least, the most important problem in the present manufacturing clause controversy involves the restrictions to be imposed on foreign typesetting or composition. Under what they regard as a loophole in the present law, a number of publishers have for years been having their manuscripts set in type abroad, importing "reproduction proofs," and then printing their books from offset plates "by lithographic process * * * wholly performed in the United States." The language of the statute on this point is ambiguous and, although the publishers' practice has received some support from the Copyright Office, there is a question as to whether or not it violates the manufacturing requirements.

In general the book publishers have opposed any definition of domestic manufacture that would close the "repro proof" loophole or that would interfere with their use of new techniques of book production, including use of imported computer tapes for composition here. This problem was the focal point of a compromise agreement between representatives of the book publishers and authors on the one side and of typographical firms and printing trades unions on the other. The committee has accepted this compromise as a reasonable solution to the problem.

Under subsection (c) the manufacturing requirement is confined to the following processes: (1) typesetting and plate making, "where the copies are printed directly from type that has been set, or directly from plates made from such type"; (2) the making of plates, "where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies"; and (3) in all cases, the "printing or other final process of producing multiple copies and any binding of the copies." Under the subsection there would be nothing to prevent the importation of reproduction proofs, however they were prepared, as long as the plates from which the copies are printed are made here and are not themselves imported. Similarly, the importation of computer tapes from which plates can be prepared here would be permitted. However, regardless of the process involved, the actual duplication of multiple copies, together with any binding, are required to be done in the United States or Canada.

Effect of noncompliance with manufacturing requirement

Subsection (d) of section 601 makes clear that compliance with the manufacturing requirements no longer constitutes a condition of copyright protection, and that the effects of noncompliance are limited to rights with respect to reproduction and distribution of copies. The bill does away with the special "ad interim" time limits and registration requirements of the present law and, even if copies are imported or distributed in violation of the section, there would be no effect on the copyright owner's right to make and distribute phonorecords of the work, to make derivative works including dramatizations and motion pictures, and to perform or display the work publicly. Even the rights to reproduce and distribute copies are not lost in cases of violation, although they are limited as against certain infringers.

Subsection (d) provides a complete defense in any civil action or criminal proceeding for infringement of the exclusive rights of reproduction or distribution of copies where, under certain circumstances, the defendant proves violation of the manufacturing requirements. The defense is limited to infringement of the "nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material". This means, for example, that the owner of copyright in photographs or illustrations published in a book copyrighted by someone else would not be deprived of his rights against an infringer who proves that there had been a violation of section 601.

Section 601(d) places the full burden for proving violation on the infringer. His defense must be based on proof that: (1) copies in violation of section 601 have been imported or publicly distributed in the United States "by or with the authority" of the copyright owner; and (2) that the infringing copies complied with the manufacturing requirements; and (3) that the infringement began before an authorized edition complying with the requirements had been registered. The third of these clauses of subsection (d) means, in effect, that a copyright owner can reinstate his full exclusive rights by manufacturing an edition in the United States and making registration for it.

Subsection (e) requires the plaintiff in any infringement action involving publishing rights in material subject to the manufacturing clause to identify the manufacturers of the copies in his complaint.

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Correspondingly section 409 would require the manufacturers to be identified in applications for registration covering published works subject to the requirements of section 601.

SECTION 602. INFRINGING IMPORTATION

Scope of the section

Section 602, which has nothing to do with the manufacturing requirements of section 601, deals with two separate situations: importation of "piratical" articles (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of section 602 is to make unauthorized importation an act of infringement in both cases, but to permit the Bureau of Customs to prohibit importation only of "piratical" articles.

Section 602(a) first states the general rule that unauthorized importation is an infringement merely if the copies or phonorecords "have been acquired abroad," but then enumerates three specific exceptions: (1) importation under the authority or for the use of a governmental body, but not including material for use in schools or audiovisual material for any purpose other than archival use; (2) importation for the private use of the importer of no more than one copy or phonorecord of a work at a time, or of articles in the personal baggage of travelers from abroad; or (3) importation by nonprofit organizations "operated for scholarly, educational, or religious purposes" of "no more than one copy of an audiovisual work solely for archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes." Under the definition in section 101, "audiovisual works" include motion pictures. If none of the three exemptions applies, any unauthorized importer of copies or phonorecords acquired abroad could be sued for damages and enjoined from making any use of them, even before any public distribution in this country has taken place.

Importation of "piratical" copies

Section 602(b) retains the present statute's prohibition against importation of "piratical" copies or phonorecords—those whose making "would have constituted an infringement of copyright if this title had been applicable." Thus, the Bureau of Customs could exclude copies or phonorecords that were unlawful in the country where they were made; it could also exclude copies or phonorecords which, although made lawfully under the domestic law of that country, would have been unlawful if the U.S. copyright law could have been applied. A typical example would be a work by an American author which is in the public domain in a foreign country because that country does not have copyright relations with the United States; the making and publication of an unauthorized edition would be lawful in that country, but the Bureau of Customs could prevent the importation of any copies of that edition.

Importation for infringing distribution

The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined. However, in cases of this sort it would be impracticable for the Bureau of Customs to attempt to enforce the importation prohibition, and section 602(b) provides that, unless a violation of the manufacturing requirements is also involved, the Bureau has no authority to prevent importation "where the copies or phonorecords were lawfully made." The subsection would authorize the establishment of a procedure under which copyright owners could arrange for the Bureau to notify them whenever articles appearing to infringe their works are imported.

SECTION 603. ENFORCEMENT OF IMPORTATION PROHIBITIONS

The importation prohibition of both sections 601 and 602 would be enforced under section 603, which is similar to section 109 of the statute now in effect. Subsection (a) would authorize the Secretary of the Treasury and the Postmaster General to make regulations for this purpose, and subsection (c) provides for the disposition of excluded articles.

Subsection (b) of section 603 deals only with the prohibition against importation of "piratical" copies or phonorecords, and is aimed at solving problems that have arisen under the present statute. Since the Bureau of Customs is often in no position to make determinations as to whether particular articles are "piratical," section 603(b) would permit the Customs regulations to require the person seeking exclusion either to obtain a court order enjoining importation, or to furnish proof of his claim and to post bond.

SECTIONS 701 THROUGH 709. ADMINISTRATIVE PROVISIONS

Chapter 7, entitled "Copyright Office," sets forth the housekeeping provisions of the bill, Aside from the provisions on retention of deposits, catalogs, and fees, these sections appear to present no problems of content or interpretation requiring comment here.

Retention and disposition of deposited articles

A recurring problem in the administration of the copyright law has been the need to reconcile the storage limitations of the Copyright Office with the continued value of deposits in identifying copyrighted works. Aside from its indisputable utility to future historians and scholars, a substantially complete collection of both published and unpublished deposits, other than those selected by the Library of Congress, would avoid the many difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed. The basic policy behind section 704 is that copyrighted deposits should be retained as long as possible, but that the Register of Copyrights and the Librarian of Congress should be empowered to dispose of them under appropriate safeguards when they decide that it has become necessary to do so.

Under subsection (a) of section 704, any copy, phonorecord, or identifying material deposited for registration, whether registered or not, becomes "the property of the United States." This means that the copyright owner or person who made the deposit cannot demand its return as a matter of right, even in rejection cases, although

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the provisions of sections 407 and 408 are flexible enough to allow for special arrangements in exceptional cases. On the other hand, Government ownership of deposited articles under section 704(a) carries with it no privileges under the copyright itself; use of a deposited article in violation of the copyright owner's exclusive rights would be infringement.

With respect to published works, section 704(b) makes all deposits available to the Library of Congress "for its collections, or for exchange or transfer to any other library"; where the work is unpublished, the Library is authorized to select the deposit for its own collections, but not for transfer outside the Library. Motion picture producers have expressed some concern lest the right to transfer copies of works, such as motion pictures, that have been published under rental, lease, or loan arrangements, might lead to abuse. However, the Library of Congress has not knowingly transferred works of this sort to other libraries in the past, and there is no reason to expect it to do so in the future.

For deposits not selected by the Library, subsection (c) provides that they, or "identifying portions or reproductions of them," are to be retained under Copyright Office control "for the longest period considered practicable and desirable" by the Register and the Librarian. When and if they ultimately decide that retention of certain deposited articles is no longer "practicable and desirable," the Register and Librarian have joint discretion to order their "destruction or other disposition." Because of the unique value and irreplaceable nature of unpublished deposits, the subsection requires their preservation throughout their term of copyright.

Subsection (d) of section 704 establishes a new procedure under which a copyright owner can request retention of deposited material for the full term of copyright. The Register of Copyrights is authorized to issue regulations prescribing the fees for this service and the "conditions under which such requests are to be made and granted."

Catalog of copyright entries

Section 707(a) of the bill retains the present statute's basic requirement that the Register compile and publish catalogs of all copyright registrations at periodic intervals, but gives him "discretion to determine, on the basis of practicability and usefulness, the form and frequency of publication of each particular part." This provision will in no way diminish the utility or value of the present catalogs, and the flexibility of approach, coupled with use of the new mechanical and electronic devices now becoming available, will avoid waste and result in a better product.

Copyright Office fees

The schedule of fees set out in section 708 of the bill is consistent in amount with the fee increase enacted by Congress in 1965 (Public Law 89-297, effective November 26, 1965): the basic fees are $6 for registration, $4 for renewal registration, $5 up for recordation of documents, and $5 per hour for searching. The section also contains new fee provisions needed because of new requirements or services established under the bill, and subsection (a)(12) authorizes the Register to fix additional fees, on the "basis of the cost of providing the service," for "any other special services requiring a substantial amount of time or expense." Subsection (b) makes clear that, unless he chooses to

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waive them in "occasional or isolated cases involving relatively small amounts," the Register is to charge fees for services he renders to other Government agencies.

Postal Interruptions

Section 709 authorizes the Register of Copyrights to issue regulations to permit the acceptance by the Copyright Office of documents which are delivered after the close of the prescribed period if the delay was caused by a general disruption or suspension of postal or other transportation or communications services.

CHAPTER 8.—COPYRIGHT ROYALTY TRIBUNAL

General considerations

This legislation establishes statutory rates applying to cable television systems, the performance royalty in sound recordings, the mechanical royalty, and jukeboxes. The legislation also provides that with respect to cable television, the performance royalty in sound recordings and jukeboxes, the royalty fees shall be deposited with the Register of Copyrights for distribution to the respective claimants. The committee believes that sound public policy requires that rates specified in the statute shall be subject to periodic review. It is neither feasible nor desirable that these rates should be adjusted exclusively by the normal legislative process. Therefore, Chapter 8 establishes in the Library of Congress a Copyright Royalty Tribunal for the dual purpose of making determinations concerning the adjustment of statutory royalty rates and to make determinations in certain circumstances concerning the distribution of royalty fees deposited with the Register of Copyrights.

With respect to the adjustment of the statutory royalty rates the purpose of the Tribunal is "to assure that such rates are reasonable." The committee in fixing the royalty rates has had to weigh various considerations, such as the circumstance that certain users will be paying copyright royalties for the first time, and that a new performance royalty was being established. While these considerations influenced the committee's determination on rates it in no way restricts the independence of the Tribunal to recommend adjustment of these rates to assure that the rates are "reasonable" according to whatever criteria the Tribunal deems appropriate. The committee does not intend that the rates in this legislation shall be regarded as precedents in future proceedings of the Tribunal.

Petitions for the adjustment of royalty rates

Section 802(a) provides that on July 1, 1975 the Register of Copyrights shall commence the proceedings for a review of the rates specified in sections 111, 114, 115 and 116.

During calendar year 1982, and in each subsequent fifth calendar year, any owner or user of a copyrighted work whose royalty rates are initially specified by sections 111, 114, 115 and 116, or as previously adjusted by the Tribunal, or the duly authorized agent of such user, may file a petition with the Register of Copyrights declaring that the petitioner requests an adjustment of the statutory royalty rate, or a rate previously established by the Tribunal. The Register shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that the petitioner has a significant interest, he shall cause notice of his decision to be published in the Federal Register.

At the expiration of the calendar year the Register shall make a determination as to whether an applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that at least one petition has established a significant interest, he shall cause notice of his decision to be published in the Federal Register and proceed as provided in Section 803 for the constitution of a panel of the Tribunal to consider an adjustment of the appropriate statutory rate. Only one panel would be established for each royalty rate.

Regulations of the Register of Copyrights

Section 702 authorizes the Register of Copyrights, subject to the approval of the Librarian of Congress, to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility. It is contemplated that the Register will issue the necessary regulations in such matters as the form and content of petitions for adjustment of royalty rates, the form and content of claims filed pursuant to Sections 111, 114 and 116, general regulations for the functioning of panels of the Tribunal, and such administrative regulations as are necessary concerning compensation of members of the Tribunal and expenses of the Tribunal.

Membership of the Tribunal

According to Section 802, or upon certifying the existence of a controversy concerning the distribution of royalty fees, the Register shall request the American Arbitration Association or any similar successor organization to furnish a list of three members of the Association. In referring to members of the American Arbitration Association the intent is to include those individuals who are officially members of arbitration panels of the Association.

The Register shall communicate the proposed names, together with such information as may be appropriate, to all known parties of interest. Any such party within twenty days from the date of the communication may submit to the Register written objections to any or all of the proposed names. If no objections are received, or if the Register determines that the objections are not well founded, he shall certify the appointment of the three designated individuals to constitute a panel of the Tribunal for the consideration of the specified rate or royalty distribution.

If the Register determines that the objections to the designation of one or more of the proposed individuals are well founded, the Register shall request the American Arbitration Association or successor organization to propose the necessary number of substitute individuals.

The Register upon receiving such additional names shall constitute the panel. He shall designate one member of the panel as Chairman. It is provided that if any member of a panel becomes unable to perform his duties the Register, after consultation with the parties, may provide for the selection of a successor in the same manner as the original constitution of the panel.

Procedures of the Tribunal

Section 804 is concerned with the procedures of the Tribunal. Except as provided by law or as governed by general regulations issued by the Register under Section 702, the Tribunal shall determine its own

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procedure. It is the intent of this legislation that the Tribunal shall complete each proceeding within one year of the constitution of a panel. Upon a showing of good cause, such period may be extended upon the approval of the Committees on the Judiciary of the Senate and the House of Representatives.

Expenditures

Section 805 provides that in proceedings for the distribution of royalty fees the compensation of the members of the Tribunal and its other expenses shall be deducted prior to the distribution of the funds. In proceedings for the adjustment of royalty rates there is authorization for the appropriation of such sums as may be necessary for the compensation of the members and the expenses of the Tribunal.

Effective date of royalty adjustment

The committee strongly believes that the public interest requires that no recommendation of the Tribunal for adjustment of a statutory royalty rate shall become effective until the Congress has had the opportunity to determine whether the proposed adjustment should be disapproved. Therefore, the Tribunal is required to transmit its decision for adjustment of any statutory royalty rate to both Houses of Congress.

Section 807 establishes a procedure, modeled on the Reorganization Act, whereby within a specified ninety-day period of time either House of Congress may adopt a resolution stating in substance that the recommended royalty adjustment is not favored. If such a resolution is adopted by either House of Congress the adjustment shall not become effective and the Tribunal may not give further consideration to the adjustment of the royalty rate until the expiration of the next period specified in Section 802. If neither House adopts a resolution of disapproval, the adjustment of the royalty rate shall take effect on the first day following 90 calendar days after the expiration of the period in which the Congress may adopt a resolution of disapproval.

Effective date of royalty distribution

Section 808 provides that a final determination of the Copyright Royalty Tribunal concerning the distribution of royalty fees pursuant to Sections 111, 114, and 116 becomes effective as to a particular claimant 30 days following the communication to the claimant of written notice of the determination, unless prior to that time an application for judicial review has been filed, and notice of the application has been served upon the Register of Copyrights. If an application for judicial review is filed, the Register is authorized to distribute the royalty fees, but must withhold from distribution such amounts as are directly the subject of the application for judicial review.

Judicial review

It is the view of the Committee that the Copyright Royalty Tribunal affords the most practical and equitable forum for final determinations concerning the distribution of royalty fees among the various claimants. The Committee believes that no useful purpose would be served by providing for a general review of such determinations by the Federal courts. Section 809 is modeled on the Federal Arbitration Act and provides that the determinations of the Tribunal shall not be subject to review in any Federal court unless:

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(1) the determination was procured by corruption, fraud, or undue means;

(2) there was evident partiality or corruption in any member of the Tribunal; or

(3) any member of the Tribunal was guilty of any misconduct by which the rights of any party were prejudiced.

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

Sections 102 through 113 of the bill are "transitional and supplementary" provisions which would not be a part of the new title 17.

Effective date

Under section 102 of the transitional and supplementary provisions, the revised title 17 would come into effect on January 1, 1975, "except as otherwise provided by section 304(b)." The reference to section 304(b) is necessary to take account of the specified cases of subsisting renewal copyrights that have already been extended under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, and 92-566, rights scheduled to expire during 1974, and of copyrights for which renewal registration is made between December 31, 1973, and December 31, 1974. In these cases the new statute would operate, before its effective date, to extend the total duration of copyright to 75 years from the date it was secured.

Works in the public domain

Since there can be no protection for any work that has fallen into the public domain before January 1, 1975, section 103 makes clear that lost or expired copyrights cannot be revived under the bill. The second sentence of the section, which prohibits recording rights in nondramatic musical works copyrighted before July 1, 1909, relates to the provision in the 1909 act limiting recording rights to musical works copyrighted after its effective date.

Amendments of other statutes

Section 103 in the present bill contains five subsections, each amending an existing Federal statute that refers to copyright protection. Consistent with the provisions of section 105 on works of the U.S. Government, subsection (a) repeals the vestigial provision of the Printing Act dealing with the same subject. As explained above in connection with section 301, subsection (b) amends the Federal Records Act of 1950 to preserve immunity of the General Services Administration with respect to infringement of Presidential papers that have neither been published nor registered for copyright.

Section 1498(b) of title 28 of the United States Code, the provision dealing with Government liability for copyright infringement, is amended by section 105(c) to substitute the appropriate section number.

Subsection (d) would amend section 543(a)(4) of the Internal Revenue Code, as amended, to delete a parenthetical phrase exempting common law copyrights and copyrights in commercial prints and labels from special treatment of personal holding company income; the Treasury Department has agreed to this amendment. Subsection (e) repeals a clause of section 3202(a) of title 39 of the United States Code dealing with the free mailing privilege for copyright deposits under

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the present law. Finally, subsection (f) amends a provision of the Standard Reference Data Act creating a special exception to the prohibition against copyright in works of the United States Government.

Existing compulsory licenses for mechanical reproduction of music

As already explained in connection with section 115, the bill would preserve the general principle of a compulsory license for the mechanical reproduction of copyrighted music, but with a great many changes in specific features. Section 106 is a transitional provision dealing with the status of compulsory licenses that have already been obtained when the new law becomes effective. In general it would permit the compulsory licensee to "continue to make and distribute such parts [i.e., phonorecords] embodying the same mechanical reproduction [i.e., sound recording] without obtaining a new compulsory license." However, any new "mechanical reproduction" would be fully subject to the provisions of section 115 and, even where the earlier sound recording is reproduced, any phonorecords made after January 1, 1975 would be subject to the provisions of the revised statute as to royalty rate, methods of payment, and consequences of default.

Ad interim copyrights

As an exception to the manufacturing requirements, sections 22 and 23 of the present statute provide a special procedure under which, if registration is made within 6 months after publication, a temporary or "ad interim" copyright can be secured for 5 years. The "ad interim" time limits and procedures have been dropped from the manufacturing provisions of section 601 of the bill, and section 107 therefore deals with the transitional case of "any work in which ad interim copyright is subsisting or is capable of being secured on December 31, 1974." Where a work is already covered by an ad interim copyright or, having been published during the last 6 months of 1974, the work is eligible for ad interim registration on that date, its copyright protection is automatically extended to the full term provided by section 304.

Notice in copies of previously published works

Since the notice requirements of the new statute are different and, with respect to the year date, more inclusive than those of the present law, a transitional provision is needed to cover works first published before the effective date of the revised law. Section 108 makes clear that, as a general rule, the notice provisions of the new law apply to "all copies or phonorecords publicly distributed after January 1, 1975," but adds that, in the case of a work published before that date, "compliance with the notice provisions of title 17 either as it existed on December 31, 1974, or as amended by this act, is adequate with respect to copies publicly distributed after December 31, 1974."

Registration and recordation with respect to subsisting copyrights

Section 109 of the transitional and supplementary provisions makes clear that registration and recordation on the basis of materials received in the Copyright Office before the effective date of the new law are to be made under the present law, even though the process is completed after January 1, 1975. Where the Register of Copyrights makes a demand, either before or after the effective date of the new law, for deposit of copies published before that date, section 110 provides that the demand, and the effect of noncompliance with it, will be governed

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by the present statute; however, any deposit, application, and fee received after December 31, 1974, in response to the demand are to be filed in accordance with the revised statute.

Several provisions of the bill including sections 205(c) (2), 205(d), 405(a) (2), 436(a) (1), 406(a) (2), 411, and 412, prescribe registration or recordation as a prerequisite of certain purposes. Where the work involved is covered by a subsisting copyright when the new law becomes effective, it is intended that any registration or recordation made under the present law would satisfy these provisions.

Phonograph Records bearing counterfeit labels

Section 111 amends Section 2318 of title 18 of the United States Code, the record label counterfeit statute, to increase the criminal penalty from the current misdemeanor status. A person shall be fined not more than $25,000 or imprisoned not more than 3 years, or both, for the first offense of knowingly and with fraudulent intent causing the transportation of phonorecords bearing forged or counterfeit labels. For any subsequent offense a person shall be fined not more than $50,000 or imprisoned not more than 7 years, or both.

Other transitional and supplementary provisions.

Section 112 makes clear that a cause of action existing on January 1, 1975, is to be governed by the law under which it arose, and section 113 is the familiar clause preserving the constitutionality of the remainder of the statute if any part of it is held unconstitutional.

TITLE II—NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

PURPOSE OF TITLE II

The purpose of the proposed Title II, as amended, is to establish a National Commission to study and compile data on the reproduction and use of copyrighted works of authorship (1) in automatic systems capable of storing, processing, retrieving, and transferring information, and (2) by various forms of machine reproduction; and the creation of new works by the application or intervention of automatic systems or machine reproduction. The Commission is directed to make recommendations to the President and the Congress concerning such changes as may be necessary to assure for such purposes access to copyrighted works and to provide recognition of the rights of copyright owners.

Prior to the introduction of copyright revision legislation in the Congress, exhaustive study was given by the Copyright Office and various interested groups to those issues that it was anticipated would require attention by the Congress during the revision program. The current or potential impact of computers and other information storage and retrieval systems on the copyright revision effort was not foreseen and consequently the bill submitted to the Congress did not take into account the significance of this new technology.

The first extensive consideration of these matters in the Congress occurred during the hearings of this committee's Subcommittee on Patents, Trademarks, and Copyrights. At the same time within the executive branch the Committee on Scientific and Technological Information of the Federal Council for Science and Technology was also exploring these problems. It became apparent during the subcommittee examination of this subject that if the Congress were to undertake at this time to make a final determination concerning the possible necessity of modifications in the copyright law, because of various technological advances, it would delay for at least several years the enactment of a general copyright revision bill. Such a delay would be extremely undesirable in view of the obvious need for revision of the copyright statute, which is essentially that enacted in 1909. More importantly, sufficient information is currently not available to provide the foundation for a sound judgment concerning the future development of the technology and the necessity for modification of the copyright statute.

Another important copyright issue arising from technological developments is the reproduction of copyrighted material by the use of various machines. Photocopying in all its forms presents significant questions of public policy, extending well beyond that of copyright law. In additon, the creation of new works by the application or intervention of automatic systems or machine reproduction presents important copyright questions that require further study.

The Senate during the 90th Congress passed S. 2216 to create the National Commission but no further action on that bill was taken by the House of Representatives.

SECTIONAL ANALYSIS OF TITLE II

An analysis of the provisions of Title II follows:

Section 201(a) establishes the Commission in the Library of Congress. Section 201(b) defines the purpose of the Commission as the study and compilation of data on the reproduction and use of copyrighted works (1) in automatic systems capable of storing, processing, retrieving, and transferring information, and by various forms of machine reproductions, not including reproduction by instructors for use in face-to-face teaching activities; (2) and the creation of new works by the application or intervention of automatic systems or machine reproduction. It is further provided that the Commission shall make recommendation as to such changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners.

Section 202(a) provides that the Commission shall be composed of 13 members as follows: four members, selected from authors and other copyright owners; four members selected from users of copyrighted works; four nongovernmental members selected from the public generally, all to be appointed by the President; and the Librarian of Congress.

Section 202(b) provides that the President shall appoint a Chairman and Vice Chairman from among the four members selected from the public and that the Register of Copyrights shall serve as a nonvoting member of the Commission.

Section 202(c) defines a quorum. Section 202(d) provides for the filling of vacancies on the Commission.

Section 203(a) specifies the compensation to be received by members of the Commission. Section 203(b) provides that officers or employees of the Federal Government shall serve on the Commission without compensation, other than expenses.

Section 204(a) authorizes the Commission to appoint a staff which shall be an administrative part of the Library of Congress. This staff shall be under the exclusive control of the Commission and its Executive Director. The staff should be composed of individuals who are knowledgeable in those areas which are relevant to the work of the Commission and should not be limited solely to specialist in copyright law. Section 204(b) authorizes the Commission to procure temporary and intermittent services.

Section 205 authorizes the appropriations of such sums as may be necessary to carry out the provisions of this legislation.

Section 206(a) requires that the Commission shall submit to the President and the Congress within 1 year of its first meeting a preliminary report on its activities. Section 206(b) directs the Commission to submit a final report within 3 years after the effective date of this legislation. Section 206(c) authorizes the Commission to publish certain interim reports.

Section 207(a) authorizes the Commission to hold hearings, administer oaths and require, by subpena or otherwise, the attendance of witnesses and the production of documents. Section 207(b) provides authorization for various meetings, seminars or conferences.

Section 208 provides that the Commission shall terminate 60 days after the submission of its final report

COMMITTEE CONCLUSION

The committee believes that the membership of the Commission should provide a balanced representation of all interested viewpoints, in addition to representation of the public generally. The work and recommendations of the Commission will be of the greatest significance to future uses of intellectual property. It is, therefore, imperative that those selected to serve on the Commission should, through knowledge and experience, be qualified to evaluate the social and economic implications of the new technologies.

Major factors leading to this legislation have been the use of information systems for educational and data retrieval and dissemination purposes. Since it is anticipated that these systems will use copyrighted textbooks and other educational materials, it is the view of the committee that in selecting Commission members from the category of copyright owners priority should be accorded to the representatives of the creators and copyright owners of textbooks and other educational materials and to creators and proprietors of commercial information product and services created by use of automated systems and machine reproduction.

In selecting members of the Commission in the classification of users of copyrighted works, it is the intent of the committee that consideration be given to including members selected from educational institutions, librarians, manufacturers, or suppliers of computer machinery and governmental users, at the State and local level as well as the Federal Government.

It is not the intent of the committee that the Commission should undertake to reopen the examination of those copyright issues which have received detailed consideration during the current revision effort, and concerning which satisfactory solutions appear to have been achieved.

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TITLE III—PROTECTION OF ORNAMENTAL DESIGNS OF USEFUL ARTICLES

PURPOSE OF TITLE III

The purpose of the proposed legislation, as amended, is to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. The title is intended to offer the creator of ornamental designs of useful articles a new form of protection directed toward the special problems arising in the design field, and is intended to avoid the defects of the existing copyright and design patent statutes by providing simple, easily secured, and effective design protection for the period of 5 years, or, if renewed, a period of 10 years under appropriate safeguards and conditions.

Such designs are presently protected by design patents issued under title 35, United States Code, if they meet the requirements of title 35. A design patent may not be issued until a search has been made to determine that such design possesses novelty. The design patent law, while affording protection to some designs, has proved adequate to protect those whose designs have only a short life expectancy.

The present copyright statute is equally inappropriate for the protection of such designs. The term of copyright protection is too long for the majority of designs. The scope of copyright protection is too broad, while the notice and registration requirements do not fit the needs of design protection. Also, the copyright law protects only those designs which can be separately identified as "works of art."

Because of the limitations of both the design patent and copyright laws, this legislation proposes to establish a new form of protection for "original ornamental designs of useful articles." The subject matter of the bill is limited to designs of useful articles, the term "design" referring to those features of the useful article intended to give it an ornamental appearance. The protection provided by this legislation would begin when a useful article, bearing the design, is made public, and would last for 5 or, if renewed, 10 years.

Nothing in this legislation would affect any rights or remedies presently available under titles 17 and 35 of the United States Code.

SECTIONAL ANALYSIS OF TITLE III

An analysis of the provisions of Title III follows:

Section 301(a) provides that the author of an original ornamental design of a useful article may secure the protection provided by this bill upon complying with certain provisions. Section 301(b) defines the terms "useful article," "design of a useful article," "ornamental," and "original."

Section 302 specifies that protection under this bill shall not be available for a design that is not original; is staple or commonplace; is different from a design that is staple or commonplace only in significant details; or is dictated solely by a utilitarian function of the article that embodies it; or is composed of three-dimensional features of shape and surface with respect to men's, women's, and children's apparel, including undergarments and outerwear.

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Section 303 provides that protection for a design shall be available notwithstanding the employment in the design of subject matter excluded from protection under section 302 if the design is a substantial revision, adaptation, or rearrangement of said subject matter, provided that such protection shall be available to a design employing subject matter protected under title 17 or 35 of the United States Code or under this legislation only if such protected subject matter is employed with the consent of the proprietor thereof. It is further provided that such protection shall be independent of any subsisting protection in subject matter employed in the design, and shall not be construed as securing any right to subject matter excluded from protection or as extending any subsisting protection.

Section 304(a) provides that the protection provided for a design shall commence upon the date when the design is first made public. It is provided in section 304(b) that a design is first made public when an article embodying the design is anywhere publicly exhibited, publicly distributed, or offered for sale to the public.

Section 305(a) provides that the protection provided for a design by this legislation shall continue for a term of 5 years from the date of the commencement of protection but if an application for renewal is received during the year prior to the expiration of the 5-year term, the protection shall be extended for an additional period of 5 years from the date of expiration of the first 5 years. It is provided in section 305(b) that when the design notice actually applied shows a date earlier than the date of commencement of protection, protection shall terminate as though the term had commenced at the earlier date.

Section 305(c) declares that where the distinguishing elements of a design are in substantially the same form in a number of useful articles, the design shall be protected as to all such articles when protected as to one of them, but not more than one registration will be required.

Section 306(a) provides that whenever any design for which protection is sought is made public, the proprietor shall mark it or have it marked with a design notice consisting of the three specified elements.

Section 306(b) requires that the notice shall be so located as to give reasonable notice of design protection while the useful article embodying the design is passing through its normal channels of commerce.

Section 306(c) specifies that the removal, destruction, or obliteration by others of the design notice shall not affect protection under this bill when the proprietor of a design has complied with the provisions of this section.

Section 307 declares that the omission of the notice prescribed in section 306 shall not cause loss of the protection or prevent recovery for infringement against persons who, after written notice of the design protection, begin an undertaking leading to infringement. However, such omission shall prevent recovery against a person who began an undertaking leading to infringement before receiving notice, and no injunction shall be issued unless the proprietor of the design shall reimburse for any reasonable expenditure or obligation in connection with undertakings incurred before written notice of design protection.

Section 308(a) provides that it shall be infringement of a design for any person without the consent of the proprietor of a design to make, have made, or import, for sale or for use in trade, any infringing article or sell or distribute for sale or for use in trade any such infringing article. It is provided that a seller or distributor of any article who did not make or import the same shall be deemed to be an infringer only if he induced or acted in collusion with a manufacturer to make or an importer to import such article or if he refuses or fails to make a prompt disclosure of his source of such article, and he orders or reorders such article after having received a personal written notice of the protection subsisting in the design.

Section 308(b) provides that it shall not be infringement to make, have made, import, sell, or distribute any article embodying a design created without knowledge of, and copying from, a protected design.

Section 308(c) specifies that a person who incorporates into his own product of manufacture an infringing article acquired from others in the ordinary course of business or who, without knowledge of the protected design, makes or processes an infringing article for the account of another person in the ordinary course of business shall not be deemed an infringer except under the conditions set forth in this section.

Section 308(d) defines what constitutes an "infringing article."

Section 308(e) requires that the party in an action alleging the validity of a registered design shall have the burden of affirmatively establishing its originality whenever the opposing party introduces an earlier work which is identical to such design or so similar as to make a prima facie showing that the registered design was copied from such work.

Section 309(a) provides that protection shall be lost if application for registration of the design is not made within 6 months after the date on which the design was first made public.

Section 309(b) specifies that application for registration or renewal may be made by the proprietor of the design.

Section 309(c) requires that the application for registration shall be made to the Administrator and states the matters which shall be included in the application.

Section 309(d) requires that the application shall be accompanied by a statement under oath and sets forth the matter that must be sworn to by the applicant.

Section 309(e) guarantees that error in any statement or assertion as to the utility of the article shall not affect protection under the act.

Section 309(f) provides that errors in omitting a joint author or in naming an alleged joint author shall not affect the validity of the registration, or the actual ownership for the protection of the design, provided that the name of one individual who was in fact an author is stated in the application.

Section 309(g) provides that the application shall be accompanied by two copies of a drawing or other pictorial representation of the useful article.

Section 309(h) permits related articles having common design features be included in the same application under prescribed conditions.

Section 310 provides that an application for registration of a design in this country by a person who has previously filed an application for registration of the same design in a foreign country which affords similar privileges to U.S. citizens, shall have the same effect as if filed

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in this country on the date on which the application was first filed in any such foreign country, if the application in this country is filed within 6 months from the earliest date on which any such foreign application was filed.

Section 311 prescribes the procedures for the administering of the oaths and acknowledgements required by this act.

Section 312(a) provides that upon the filing of an application and upon payment of the fee, the Administrator shall determine whether or not the application relates to a design which, on its face, appears to be subject to protection and if so, shall register the design. It is further provided in section 312(b) that if the Administrator determines that the application on its face relates to a design which is not subject to protection, the Administrator shall notify the applicant, who shall have 3 months in which to request reconsideration of his application. After consideration of such a request, the Administrator shall either register the design or send the applicant a notice of final refusal to register.

Section 312(c) provides that any person who believes he is or may be damaged by a registration may, upon payment of a fee, apply to the Administrator at any time to cancel any registration on the ground that the design is not subject to protection. This section further provides for the procedures to be followed in such cancellation proceedings.

Section 312(d) provides that when a design has been registered, the lack of utility of any article in which it has been embodied shall be no defense to an infringement action and no ground for cancellation.

Section 313 authorizes the issuance of certificates of registration and provides for the contents thereof.

Section 314(a) instructs the Administrator to publish lists and indexes of registered designs and cancellations thereof and authorizes him to publish the drawings or other pictorial representations of registered designs.

Section 314(b) instructs the Administrator to establish and maintain a file of the drawings or other pictorial representations of registered designs.

Section 315(a) specifies the fees which shall be paid to the Administrator.

Section 315(b) authorizes the Administrator to establish charges for materials or services furnished by the Office.

Section 316 authorizes the Administrator to establish regulations for the administration of this legislation.

Section 317 provides for the obtaining of certified copies of official records of the Office of the Administrator.

Section 318 authorizes the Administrator to correct errors in registration incurred through the fault of the Office of the Administrator.

Section 319(a) identifies those in whom the property right in the design shall rest and provides that the person or persons in whom the property right is vested shall be considered the proprietor of the design.

Section 319(b) provides for the transfer of ownership of the property right in a registered design or a design for which an application for registration has been or may be filed.

Section 319(c) specifies that an acknowledgement, as provided in section 311, shall be prima facie evidence of the execution of an assignment, grant, or conveyance.

Section 319(d) provides that an assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice, unless it is recorded in the Office of the Administrator within 3 months from its date of execution or prior to the date of such subsequent purchase or mortgage.

Section 320 provides that the proprietor of a design shall have a remedy for infringement by civil action instituted after the issuance of a certificate of registration of the design, or the final refusal of registration of the design by the Administrator.

Section 321 authorizes the granting of injunctions for the prevention of infringements.

Section 322(a) provides that the court, upon finding for the claimant, shall award damages adequate to compensate for the infringement, but in no event less than the reasonable value of the use made of the design by the infringer, and the costs of the action. It is further provided that the court may increase the damages to such amount, not exceeding $5,000 or $1 per copy, whichever is greater, as to the court shall appear to be just.

Section 322(b) excludes recovery for any infringement committed more than 3 years prior to the filing of the complaint.

Section 322(c) permits the court to award reasonable attorney's fees.

Section 322(d) authorizes the court to order the destruction or other disposition of all infringing articles and devices employed in the making of the same.

Section 323 authorizes the court to order a cancellation of a registration.

Section 324 provides a penalty for any person bringing an action for infringement knowing that registration of the design was obtained by a false representation.

Section 325(a) provides a penalty for the false marking of a design which is not protected under this legislation.

Section 325(b) specifies as to who shall have a right of action to sue for the penalty.

Section 326 provides a penalty for whoever knowingly makes a false representation materially affecting rights obtainable under this legislation.

Section 327(a) makes clear that nothing in this legislation shall affect any right or remedy now or hereafter held by any person under title 17 of the United States Code.

Section 327(b) specifies that when a work in which copyright subsists under title 17 of the United States Code is utilized in an original ornamental design of a useful article, the design shall be eligible for protection under the provisions of this legislation.

Section 328(a) provides that nothing in this legislation shall affect any right or remedy available to any person under title 35 of the United States Code.

Section 328(b) provides that the issuance of a design patent for an ornamental design under title 35 shall terminate any protection of the design under this legislation.

Section 329 specifies that nothing in this legislation shall restrict (1) common law or other rights or remedies available with respect to a design which has not been made public as provided in section 304(b), or (2) any trademark right or right to be protected against unfair competition.

Section 330 provides that the Administrator and Office of the Administrator shall be such officer and office as the President may designate

Section 331 guarantees that if any provision of this bill or the application of such provision is held invalid, the remainder of the legislation or application shall not be affected.

Section 332 makes conforming amendments to various statutes.

Section 333 specifies that this title shall take effect 1 year after its enactment.

Section 334 provides that this title shall have no retroactive effect.

Section 335 states that this title may be cited as the Design Protection Act of 1974.

LOCATION OF OFFICE OF ADMINISTRATOR

While section 330 of this legislation provides that the Administrator and Office of the Administrator shall be such officer and office as the President may designate, it is the view of the committee that such Office should be located in the Patent Office. Such disposition is acceptable to the Department of Commerce and the Patent Office.

COMMITTEE CONCLUSION

After a study of this title, the committee adheres to its former endorsement of design protection legislation and recommends that the title, as amended, be favorably considered. The principal objection made during the hearings of the Subcommittee on Patents, Trademarks, and Copyrights was a concern that retailers would be made liable by the mere sale of an article infringing a patented design. It is the view of the committee that section 308 of the bill adequately protects retailers. Under the provisions of section 308 a retailer who does not himself induce the manufacture or importation of an infringing article need not concern himself with whether or not any given item infringes a protected design. The retailer is under no duty to find out. Even if a retailer has knowledge that an article infringes a design when he buys it, this places no additional burden on him. In any event, a retailer may dispose of all stock on hand or on order at the time he receives notice of the protection of a design. Even after receiving such notice he is completely free to reorder the item as many times as he wishes if he discloses the source of the item. It is only when he refuses to disclose such source that he must refrain from reordering.

This being a complete revision of title 17, the copyright law of 1909, as amended, in the opinion of the committee it is necessary to dispense with the requirements of subsection (4) of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

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ADDITIONAL VIEWS OF SENATOR JOHN V. TUNNEY

I regret that the royalty fee schedule for cable television systems established by Senator McClellan's subcommittee in section 111(d)(2)(B) of this bill was cut in half by a two-vote margin during the full committee markup of the copyright bill. I opposed that action because in my judgment the original fees were quite modest in terms of the cost imposed upon the cable operators and reasonable with respect to the interests of the copyright owners.

Senator Burdick's compromise, which would have limited a cut in copyright fees to the smaller cable systems, was more justified, and I regret that the committee rejected it in favor of the complete reduction of fees.

The committee's report contains the following statements, with which I am in full accord:

> * * * very little relevant economic data was available to the subcommittee * * *. When it established the schedule of payments in S. 543. The subcommittee in 1973 held a hearing on the royalty schedule previously approved by the subcommittee and contained in S. 1361 at this hearing the program producers, broadcasters and music performing rights societies expressed opposition to the inclusion of a royalty schedule in the statute * * *. The committee believes that the economic data available at the present time is inconclusive but supports the Congress initially establishing royalty rates * * *. The committee does not intend that the rates in this legislation shall be regarded as precedents in future proceedings of the tribunal * * *.

I believe the subcommittee made a fair and reasonable attempt to match the burden which this new fee would place on cable systems against the need to compensate the producers of television program material, who had never been compensated before by the cable industry. These producers, of course, provide the bulk of the product which cable TV gives to its subscribers.

The fact is that copyright royalty income is essential to the continued creation of program products. The film production industry, which is the major source of the copyrighted program material used in both broadcast and cable television, is in serious economic straits. In New York, California, and smaller production centers, high levels of unemployment exist, reaching 60% and 70% of the membership of some craft unions, such as the Teamsters, carpenters, scene makers, and painters, and over 50% in the film extras Guild.

The ability to produce a television or theatrical film depends in no small part on the revenues derived from the copyright royalty on program material. The royalty fees to be derived from the cable television industry will be a significant factor in determining whether the levels of activity and employment will decline or expand.

The hardship on program producers of cutting the fee schedule is magnified by the other action taken by the committee, to eliminate the so-called "sports blackout" provision. In so doing, the committee allows cable T.V. systems to obtain virtually unlimited sports programming under the compulsory license. Sports owners (or in some cases the broadcasters) who have a copyright interest in sports events are entitled to be compensated under the Act, but their compensation must come from the same pool as the compensation for the prepared program copyright holders. With more parties entitled to share in the gross receipts of the copyright royalty fees, it seems somewhat unfair to cut the total pool in half.

Those of us who supported the original subcommittee royalty fee schedule believe that it called for a modest and equitable payment rate. It should be remembered that the program producers felt this original rate was inadequate and non-compensatory. Certainly it would not have imposed any undue fiscal burden on the average cable subscriber.

The rates were graduated, with successive 1% increases on each succeeding $10,000 of quarterly subscription revenues, up to a top rate of 5% for systems with quarterly revenues above $160,000.

It has been estimated that the overall effective rate of copyright royalties for the whole cable industry would have been 2.1% under the subcommittee schedule. Assuming an average $6 monthly subscription fee, this means that cable subscribers would, on the average, have been asked to pay only about 12¢ per month to the producers of the programs which fill their screens. Even subscribers in the largest systems would have had to pay less than 30¢ a month, and it should be noted that the majority of cable systems in the country are so small that the monthly payment for these subscribers would have been well under 10¢.

Senator Burdick proposed a compromise which would have made the 50% cut in fees applicable only to the first two steps of the fee schedule. Systems with less than $80,000 quarterly subscription revenues—approximately 4400 subscribers—would have their fees halved. Since considerable concern has been raised about the plight of these smaller systems, I supported this compromise. The Burdick amendment would not have had a major effect on the overall revenues raised by the total fee schedule, quite in contrast with the committee's action to cut in half all the fees.

For all of these reasons I favored and supported the original royalty rate schedule proposed by Senator McClellan as modified by the Burdick amendment. I felt it was a fair starting point until the royalty tribunal would have had time and opportunity to assess all of the relevant economic facts. The royalty tribunal is not to be bound by the statutory schedule and would in due course make its own findings.

I hope, therefore, that the royalty tribunal may be able to act promptly in rectifying what I fear may be an upcoming critical situation for copyright owners and for those whose livelihoods depend on the welfare of copyright owners.

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ADDITIONAL VIEWS OF SENATOR HUGH SCOTT

Generally, I am very pleased with the Copyright Revision Bill, S. 1361, as was reported by the Judiciary Committee. Copyright reform is long overdue, and my hope is that swift Senate action will soon follow. All of the members of the Committee owe a great debt to Senator John McClellan, who, over the last seven years, has spent a tremendous amount of time reviewing the many complicated issues touched by copyright reform. Without his diligence we could never have progressed so far.

I would now like to comment on several aspects of the Copyright Bill which the Committee approved on June 11, 1974.

SPORTS

The treatment of sports on cable television was one of the most difficult issues to be resolved in the bill. The Copyright Subcommittee under Senator McClellan's leadership spent many hours trying to resolve it. Originally, Section 111 of the bill put a restriction on cable television systems carrying distant signal sports events without the copyright owner's permission. Because of varying opinions on the issue, the Subcommittee was not able to agree on a common approach. Therefore, the restriction on sports was not changed by the Subcommittee with the understanding that the full Committee would resolve it.

I would like to make it clear that I believe that both amateur and professional sports teams deserve some special consideration when it comes to televising their games on cable. Sports is a unique kind of televised event. Unlike movies or other programs, with few exceptions sports is only valuable for the first time it goes over the airwaves. Few people, for example, would be interested in viewing a rerun of a Pirates-Phillies baseball game originally telecast last year. Therefore, the amateur and professional teams only have a single opportunity to promote each game, a unique event.

Another point I would like to outline is that both amateur and professional teams depend to a great extent on the revenues from home gate attendance to survive. The factors influencing fans to attend a game are varied. No single element can be completely blamed for poor attendance. However, forcing a home team to compete with several other games of the same sport on cable could clearly hurt attendance. If attendance goes down, the team's revenues plummet, the businesses operating concessions are hurt, and a city will lose both tax revenue and fees from the leasing of a municipal stadium, if that is the case. For college and high school sports, the receipts from the fans' purchase of tickets for basketball and football will in many cases support the budgets of other sports (non-profitable) a school may sponsor like wrestling, lacrosse, gymnastics, baseball, hockey, track and field, and archery. It would be a terrible loss if these sports could no longer be funded. In a day when the resources of education are being pressed to the limit, non-profitable sports will probably be one of the first items cut from the budget by a school administrator seeking to economize.

Both professional and amateur sports teams will sometimes have individual team contracts to telecast some of their events. For example, the Pittsburgh Pirates baseball club makes a television contract with a local television station to televise a number of their games throughout the season. It is possible for them to sell these games to a TV station because there are advertisers who are willing to sell their products on the basis that there is some exclusivity for the telecast (re: non-competition with other baseball games). For many amateur and professional teams the revenue from the individual television contracts does make the difference between profit and loss. If cable systems within very close proximity to a city with a professional sports team or college team have a number of alternative games of the same sport simultanously being offered, the value of the contract to a television broadcaster can be reduced drastically. A broadcaster may no longer seek a contract to telecast if all exclusivity is removed. Therefore, totally uncontrolled cable transmissions of many sports events in areas with professional teams and, in some cases, college teams can have deleterious effects on revenues. The issue is not protection of television contacts but rather an attempt to ensure the financial health of sports teams so they are not forced to go out of business. Everyone will suffer if we have fewer local teams to enjoy and follow.

To meet the very complex problems I have just outlined I believe the orginal suggestion of Senator McClellan was workable. He recommended that the Federal Communications Commission be directed by the Congress to promulgate rules and regulations governing the carriage of sports by cable television. Along with this delegation of rulemaking authority, I thought his suggestion that six specific guidelines be used by the FCC was excellent. In the Subcommittee I supported Senator McClellan's amendment and I again voted for it in the full Committee when it was advanced by Senator Hart.

I would briefly like to comment on Senator Hart's approach. Senator Hart preferred instead of a delegation of ruling making authority, a "definition-of-rights" approach to the sports issue. Essentially, his amendment would have exempted all cable sports signals as of 1972 and then placed certain restrictions against massive distant signal importation of sports in cities with major and minor league professional sports teams. This amendment possessed good elements and I voted for it. It would have provided major benefit to cable systems extant in 1972, because their distant signal sports as of that date would have been totally unaffected. Also, all those cities outside the specified areas having major and minor league professional sports would have been free from any restriction on cable sports programming. Finally, it would have imposed a certainty on the entire situation. There would not have been minute-by-minute adjustments by the Federal Communications Commission. I am sorry this was not adopted as an alternative to the FCC rule making approach.

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For all reasons I have previously outlined, I did vote against Senator Gurney's amendment that would have struck all sports protection from the bill. Some minimal protection for sports is needed if teams are to remain economically healthy.

I did support the Committee action to include language in the Report relating to the sports issue. At least the language indicates that the FCC has jurisdiction over the sports issue if it wishes to exercise it. Unfortunately, the Report language did not go far enough. I agreed with Senator Hart's recommendation that the six points[1] in the original FCC sports amendment be added for the direction of the Commission. If Congress is not going to settle the issue, the FCC should act within its own authority.

In conclusion, sports is a special kind of business offering a unique product. For it to become and to stay economically sound, I think some special attention has to be paid to its peculiar needs. I oppose an imposition of a sports blackout on cable television but at the same time too much exposure on cable may destroy the viability of sports. Some moderation is needed so both sports and cable may prosper side by side. Either the so-called FCC amendment or the Hart "definition-of-rights" approach seemed to be a reasonable way to strike this balance between two legitimate competing interests.

Senator Hart has indicated his desire to join me in my views on the sports issue.

PERFORMANCE ROYALTY (SEC. 114)

I would particularly like to comment on Section 114 of S. 1361. This section requires users of copyrighted sound recordings for profit to pay a performance royalty to those who make a creative contribution to recorded music—performing artists, musicians and record companies. Although a copyright was granted to sound recordings by Congress in 1971, the issue of a performance royalty was deferred until Congress' consideration of the Copyright Revision Bill. Under section 114, entities like broadcasters, juke box operators, and background music services that make use of the recorded music would have to pay a small royalty to the artists for the right to play it.

For many years I have felt very strongly that the musical artists deserve a reward for his creative efforts. Thirty years ago when I served in the House of Representatives, I introduced H.R. 1570 (78th Congress) which would have established a performance right in sound recordings. Later in the 80th and 82nd Congresses I introduced similar bills that would mandate a performance royalty for the musical artists.

I very strongly support the inclusion of the performance royalty in the present Copyright Revision Bill. Although I realize that the broadcasters, especially, have objections to paying any fee to artists,

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[1] "* * * Under rules which the Federal Communications Commission shall promulgate, such rules taking into account the effect of such secondary transmission upon:

"(i) the availability to the public of reasonable access to televised sporting events;

"(ii) the fostering of scholastic sporting events;

"(iii) attendance and gate receipts within the home territories of scholastic and organized professional teams;

"(iv) the value of television contracts between scholastic and organized professional sports teams and broadcast stations licensed by the Federal Communications Commission;

"(v) the orderly development of the broadcasting industry, including independent and UHF stations licensed by the Federal Communications Commission; and

"(vi) the orderly development of the cable industry."

I believe the principle is important and should be supported. The argument has been made in opposition to the royalty that radio stations give free publicity to record companies and the artists who make the records. I think this argument misses the point. The real issue is whether or not a person who uses creative talents should receive compensation from someone else who takes them and profits from them. More than 75% of the air time during which advertising is sold is spent playing music. I believe if the artist's creative efforts are used in this way that he is entitled to some compensation. The performance royalty in Section 114 establishes a small payment for the right.

It should be noted that the concept of rewarding creative efforts is not at all unprecedented. Presently, the radio and television industries make yearly payments to organizations representing the individuals who compose music. The fees paid to ASCAP, SESAC, and BMI for the composers are far in excess of what the Copyright Bill sets out for a performance royalty. I find it indisputable that the creative efforts of the musical artist who performs are equally as valuable as those of the individual who writes the music. In fact, it is the special creative talents of the musical artist which really bring a particular musical composition to life. In light of this, it is an anomaly that the performers or record companies get nothing for their contributions to irreplacable programming material.

I find it significant that almost forty countries have established performing rights in recordings. These nations have acknowledged the necessity to reward the creativity of their gifted musical artists. It should be no less important for us in the United States. It is particularly key to recognize performing rights because of the unique form of activity it entails. We all know by name the famous musical artists who remain popular year after year. Unfortunately, most musical performers have a very short productive life. It is an industry in which tastes and public attitudes toward a certain type of music can literally change overnight. Some artists have only one popular song and are never successful again. If the song is played again at a later time, the artist should be entitled to share in the benefits it bestows on the broadcasters. An example of a song which has endured over a long period is Bing Crosby's rendition of "White Christmas". There must be hundreds of versions of this song, but it is Mr. Crosby's special treatment which is continuingly popular at Christmas each year. He, like any other artist, should share in the fruits of his creative effort even after the actual sale of his records diminishes.

During numerous discussions prior to the Judiciary Committee meeting, there were many statements made to the effect that small radio stations, especially, could not afford to pay a performance royalty. I argued that most stations could easily pass on the 2% rate to their advertising sponsors. For example, if the rate for one hour of advertising was $100, then the rate would go to $102. This clearly would not be an exorbitant increase. However, I do realize that the very small radio station might be in a situation where it could not pass along the 2% rate. Therefore, in the Judiciary Committee I moved to lower the rate (2%) which the bill had originally set. The new formula which

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was approved gives a substantial measure of relief to over 60 percent of the radio stations in the country. The four percent of the nation's radio stations that have net advertising receipts of less than $25,000 a year would pay no performance royalty at all. Stations with between $25,000 and $100,000 a year from net advertising receipts would only pay a blanket $250 each year. It is significant to note that about 27 percent of all radio stations would fall under the $100,000 figure. For those stations with yearly net advertising receipts between $100,000 and $200,000, only a flat $750 fee a year would be due. In that $100,000–$200,000 range approximately 34 percent of the nation's radio stations are included. Finally, for all stations with above $200,000 a year in net advertising receipts, a royalty of 1% of those net receipts would be due each year. The total revenues under the formula as revised at my recommendation would be significantly less than one half of what revenues would have been under the original 2% royalty rate.

In conclusion, I want to emphasize that the creation of a performance right for sound recordings is entirely consistent with the overall policy approach of the Copyright Bill to foster and protect the creative arts. In Section 116, the bill creates a new performance right for composers when juke boxes use compositions embodied in sound recordings, and Section 115 has been changed to increase the fees record companies must pay composers for use of their music in a recording. Most significantly, the bill establishes new rights in the case where a cable television station picks up broadcast material from the air and retransmits it. Under Section 111, the cable television station must pay a copyright fee under a compulsory license to the copyright owners. I would suggest on the same rationale which the broadcasters have been using to establish liability for the copyrighted materials taken by cable systems that broadcasters and others similarly should have to pay for copyrighted musical performances they use for their programming.

Senator Hart has indicated his desire to join me in my views on the performance royalty.

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MINORITY VIEWS OF MESSRS. EASTLAND, ERVIN, BURDICK, HRUSKA, THURMOND AND GURNEY ON THE RECORDING ARTS PERFORMANCE ROYALTY

After considerable debate and following the narrow rejection by tie votes of amendments offered by Senators Ervin, Gurney and Thurmond to delete the recording arts performance royalty of S. 1361, the Judiciary Committee reported this bill to the Senate retaining in modified form the performance royalty.

We remain committed to the position that the performance royalty is economically unwise and constitutionally unsound. It will result in extreme hardship to the broadcasting industry and to the jukebox industry. It means potential disaster to some individual broadcasters and jukebox operators.

S. 1361 would establish for the first time a performance royalty in sound recordings for the benefit of record manufacturers and performing artists. This royalty would be paid by those who perform or use sound recordings for profit—broadcasters and jukebox operators. Never before has such copyright liability been recognized at law or in the commercial relationships among the parties involved.

The Copyright Act of 1909 does not recognize any intellectual property right in sound recordings. Congress satisfied the only legitimate need for creating a copyright in recordings when, in 1971, it enacted Public Law 92-140 to protect recording companies from unauthorized copying and sale of their records. This protection, with criminal penalties for violation, survives in the current bill and deserves to be supported. In our opinion, however, it is inappropriate that the Copyright Bill should go beyond the limited copyright provision by P.L. 92-140.

Indeed, recognizing a recording arts performance royalty under the copyright law raises serious constitutional questions. Article I, Section 8, Clause 8 of the United States Constitution provides that Congress shall have power ". . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." We do not accept the view that record manufacturers and performers are "Authors" or "inventors" in the constitutional sense. Even though their contributions in producing a sound recording are significant, such contributions do not constitute original intellectual creations which would justify protection under the copyright law. To create performance royalties for the benefit of record manufacturers and performers under copyright law would stretch the Constitution's meaning beyond reason and justification.

Broadcasters and jukebox operators render a service to both performers and recording companies by playing new recordings; under S. 1361, they would now be required to pay statutory fees to those who benefit from this arrangement. For years, record companies have gratuitously provided records to stations in the hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure upon the promotion efforts of broadcasters. Radio stations and jukebox operators significantly help to popularize recordings and artists.

Record manufacturers and performers, who have greatly profited from the invaluable air play of their recordings are, nevertheless, seeking additional revenues from radio stations and jukebox operators by way of new statutory fees that could run into thousands of dollars annually for many broadcasters. Even though the Committee agreed to reduce the fee schedule with respect to broadcasters, it is estimated that the new performance royalty will cost the broadcasting industry an additional 10 percent of pretax profits. These royalty payments would accrue to an industry that has not adequately demonstrated a need.

Under the present scheme, composers, publishers, performers, and record companies all receive money from the sale of records and tapes, but only composers and publishers obtain royalties from broadcast performances, by virtue of expensive agreements negotiated between individual stations and ASCAP, BMI and SESAC representing the copyright proprietors. It has been estimated that radio stations now pay some $20 million a year to these licensing organizations for the right to play records over the air. These fees amount to roughly 3.7 percent of the stations' total broadcast revenues and represent about 25 percent of the pretax profits of the entire radio industry. Thus, broadcasters already pay significant amounts for the privilege of playing music which makes 70-80 percent of their programming formats.

We believe that the issue of whether performers receive adequate compensation for their work should not be determined in terms of copyright liability. Such a problem would seem more amenable to negotiation between artists and the recording companies that require their talents, rather than the stations which, since the demise of live music formats, no longer have direct dealings with performers. However, if the copyright fees set by S. 1361 become law, it may well become cheaper for broadcasters to revive studio orchestras and be content to pay the musicians' union scale.

The fact that both the recording industry and recording artists are being adequately compensated under the current system is demonstrated in a recent study made by Dr. Frederic Stuart of Hofstra University, concerning the distribution of income from broadcast performance and sale of phonograph records.

Professor Stuart analyzed the revenues, both from record sales and air play, generated by a random sale of popular singles and record albums. He estimated that, for the records included in his analysis, the following amounts of income were realized:

Composers	$2,570,000
Publishers	2,910,000
Performing artists	2,860,000
Record companies (after variable manufacturing costs)	10,720,000

These figures do not reflect two factors. In many instances, performing artists are also the composers and/or publishers of the songs they record, in which event they receive royalties for air play as well as from sales of the recording. On the other hand, performers and record companies must bear the cost of unsuccessful recordings. After adjusting his estimates of revenues to reflect both of these factors, Dr. Stuart concluded:

> The foregoing analysis shows the performing artist to be (on average) well ahead of (nonperforming) composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies. Although composers and publishers alone receive broadcast performance royalties, the other two functions (performing and manufacturing) are better rewarded per sale of the record than are composers or publishers; and the "average" record outsells its broadcast performances.

As the Stuart study suggests, neither record companies nor performers need the additional revenues that they seek from broadcasters. The record industry is much larger than the radio industry, in terms of total revenues. In 1972, sales of pre-recorded music (LP's and tapes) were estimated by the Record Industry Association of America to be $1,924 million; this compares with radio revenues of $1,407 million. Revenues of the record industry are not declining. On the contrary, they are increasing at a spectacular rate, exceeding by a significant margin the total revenues and the rate of growth of the radio industry. Record industry revenues have increased 42 percent in the last five years (1968–72) and 164 percent in the last ten years, whereas radio revenues increased 38 percent and 107 percent, respectively, over the same periods.

Radio profit margins have been stable or even declining during the past decade. Profits in 1972 were 9.55 percent of revenues, but in 1968 they were 11.09 percent. Furthermore, in the five-year period, 1968–72, the average profit margin fell slightly to 9.25 percent. More than 20 percent of the radio stations with net revenues greater than $200,000 lost money in 1972. It is fair to predict that additional performance royalties will turn many radio markets into unprofitable areas for broadcasters and many individual radio stations into loss operations.

It was argued that, given the principle of performance royalties, all radio operators should be required to make royalty payments, however nominal, to the Register of Copyrights, but small town stations should pay something less than big city broadcasters. It is apparent that the amount of the fees of the different levels of liability written into Section 114 were arrived at arbitrarily, with only one principle in mind: every broadcaster should pay something for playing records, without regard to an ability to pay.

In our view, the fees may well create severe economic hardships for marginal broadcast operators; they may also result in inequitable treatment of radio stations similarly situated in neighboring localities or even in the same market.

The fact that a station's annual advertising revenues, less co
sions, yield $100,000 or $200,000 or fall below those floo

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rational or reasonable relationship to the station's profitability. Radio broadcasters in large metropolitan markets, such as Detroit, Pittsburgh or Los Angeles, normally gross well over these levels; yet, because of intense competition, the number of readily available AM and FM signals, local economic conditions, high labor costs, and other factors, the stations may actually have operating deficits. By contrast, in small markets competitive conditions and costs may be such that outlets earn considerably less in net revenues but show handsome profits. It may well be easier for a successful station in a rural community with net receipts of $50,000 a year from advertisers to pay $250 a year in fees than for a broadcaster in a major city making $250,000 to pay the annual royalty of $2,500. It is possible, too, that Station A netting $200,000 will pay $2,000 in fees while station B in the same market earning $199,000 will pay only $750. Station A will pay $1,250 more in fees for only $1,000 more in revenues.

Such inequities are not surprising when it is recalled that important considerations like profits, market size, location and economics and other relevant factors were ignored in drawing up the Section 114 compromise. In light of its confessed lack of expertise in these matters, the Committee should not have ventured so precipitously into the unknown territory of broadcast performance copyright. It should have considered more carefully the experience, needs and interests of all parties most affected by any radical change in the law.

The required payment of these royalties by broadcasters may force a reduction in the non-revenue producing news and public affairs programming in order to meet the added costs. In such a situation, the listening public will be the ultimate loser.

In addition to the severe economic impact the performance royalty would have on broadcasters, it would impose an equally unjustified burden on jukebox operators. The jukebox industry is small in scale. The typical jukebox operator owns between fifty and one-hundred machines and has a relatively small profit.

Jukebox operators throughout the nation have had to diversify their operations into vending machines and amusement games just in order to stay in business. In most places the jukebox has become merely a supporting activity for vending operators and amusement games. Just this year, for example, one of the oldest, and largest, of the manufacturers of jukeboxes, the Wurlitzer Company, terminated its manufacture of jukeboxes because of declining sales and losses from this business.

Under Section 116, as approved by the Committee, jukebox operators will be paying some $4,000,000 a year in direct royalities on their estimated total of 500,000 machines. In addition, under Section 115, they will be paying indirectly $4,500,000 in mechanical royalties at 3¢ per song that will be passed on to them by record manufacturers on the 75,000,000 records that jukebox operators buy each year. We are convinced that these royalty burdens are the most that should be imposed upon an industry of small businessmen who are being subjected to performance royalties for the first time in history.

We believe for the above reasons that the performance royalty not
as to broadcasters, but also as to jukebox operators, should be
ed from this bill.

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